

9622

# THE HISTORY OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA

BY  
JAMES M. SMITH  
OF THE  
NATIONAL ARCHIVES

THE NATIONAL ARCHIVES OF THE UNITED STATES

WASHINGTON, D. C.  
1962

(16,741.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 206.

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STERLING R. COCKRILL, AS RECEIVER OF THE FIRST  
NATIONAL BANK OF LITTLE ROCK, ARKANSAS,  
PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES NATIONAL BANK OF NEW YORK.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT.

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INDEX.

	Original.	Print.
Caption to transcript from U. S. circuit court of appeals.....	1	1
Transcript from U. S. circuit court, eastern district of Arkansas...	2	1
Writ of error and clerk's return.....	2	1
Caption to transcript.....	4	2
Complaint.....	4	2
Record entry of filing of answer.....	5	3
Answer.....	5	4
Record entry of filing of amendment to answer.....	6	4
Amendment to answer.....	6	4
Answer to cross-complaint.....	8	5
Demurrer to amendment to answer.....	8	5



Record entry of filing of amendment to answer.....	9	6
Amendment to answer.....	9	6
Verdict and judgment.....	11	7
Order allowing writ of error, etc.....	12	8
Bill of exceptions.....	12	8
Testimony for plaintiff. . . . .	12	8
Note, City Electric St. R'y Co. to Brown and Allis, \$5,000, December 7, 1892.....	13	9
Note, City Electric St. R'y Co. to Brown and Allis, \$5,000, December 7, 1892.....	13	9
Note, City Electric St. R'y Co. to Brown and Allis, \$5,000, December 7, 1892. . . . .	14	9
Note, McCarthy & Joyce Co. to James Joyce, \$5,000, December 7, 1892. . . . .	14	10
Note, McCarthy & Joyce Co. to James Joyce, \$5,000, December 7, 1892.....	15	10
Testimony of Henry C. Hopkins. . . . .	16	10
Exhibit 1—Letter, Harriman to Denney, June 21, 1892.....	23	16
2—Letter, Allis, pres't, to Harriman, June 24, 1892.....	23	17
3—Telegram, U. S. national bank to First national bank, June 27, 1892. . . . .	24	18
4—Letter, Hopkins to Allis, June 27, 1892.....	25	18
5—Letter, McAuliffe to Allis, June 27, 1892.....	25	19
6—Letter, Allis to U. S. national bank, July 1, 1892.....	26	19
7—Letter, McAuliffe to Allis, July 5, 1892. . . . .	27	20
8—Telegram, U. S. national bank to First national bank, July 6, 1892.....	27	20
9—Telegram, First national bank to U. S. national bank, July 6, 1892 . . . . .	27	20
10—Letter, Allis to United States national bank, July 9, 1892.....	27	21
11—Letter, McAuliffe to Allis, July 13, 1892.....	28	21
12—Letter, McAuliffe to Smith, July 21, 1892.....	29	22
13—Telegram, U. S. national bank to First national bank, July 26, 1892.....	30	22
14—Letter, Allis to United States national bank, July 29, 1892.....	30	23
15—List of notes. . . . .	30	23
16—Letter, McAuliffe to Allis, Aug. 1, 1892. . . . .	31	23
17—Letter, Denney to United States na- tional bank, October 31, 1892.....	31	24
18—Telegram, United States national bank to First national bank, Nov. 3, 1892. . . . .	32	25
19—Letter, McAuliffe to Denney, Novem- ber 3, 1892.....	32	25

Exhibit 20—Letter, Denney to United States national bank, November 25, 1892....	33	25
21—Letter, Hopkins to Denney, November 28, 1892.....	33	26
22—Letter, Allis to United States national bank, December 13, 1892.....	33	26
23—Letter, McAuliffe to Allis, December 16, 1892.....	34	26
24—Telegram, United States national bank to First national bank, December 17, 1892.....	35	27
25—Letter, Denney to United States national bank, December 20, 1892....	35	27
26—Letter, McAuliffe to Denney, December 23, 1892.....	35	27
27—Telegram, Allis to U. S. national bank, December 21, 1892. ....	35	28
28—Letter, Parker to Allis, Dec. 21, 1892.	36	28
29—Letter, Denney to United States national bank, December 21, 1892....	36	28
30—Letter, McAuliffe to Denney, December 27, 1892. ....	36	29
31—Letter, Hopkins to Denney, July 12, 1892.....	37	29
32—Letter, Harriman to Denney, July 15, 1892.....	37	29
33—Letter, Harriman to Smith, July 28, 1892.....	37	30
34—Telegram, First national bank to United States national bank.....	38	30
35—Telegram, Denney to United States national bank, August 8.....	38	30
36—Letter, Denney to United States national bank, August 8, 1892.....	38	30
37—Letter, Hopkins to Denney, August 11, 1892.....	38	31
38—Letter, Denney to Hopkins, October 3, 1892.....	39	31
39—Telegram, First national bank to United States national bank, October 4, 1892.....	39	31
40—Telegram, First national bank to United States national bank, 10, 3, 1892.....	39	31
41—Telegram, First national bank to United States national bank, 10, 7, 1892.....	40	32
42—Telegram, First national bank to United States national bank, October 8, 1892.....	40	32
43—Letter, Harriman to Denney, October 7, 1892.....	40	32

	Original.	Print.
Exhibit 44—Letter, Denney to United States national bank, October 8, 1892. ....	40	32
45—Letter, Hopkins to Denney, October 11, 1892.....	42	33
46—Telegram, First national bank to U. S. national bank, October 10, 1892 ...	42	34
47—Letter, Harriman to Denney, October 17, 1892.....	42	34
48—Letter, Hopkins to Denney, October 27, 1892.....	43	34
49—Letter, Denney to Hopkins, October 29, 1892.....	43	34
50—Letter, Harriman to Denney, November 1, 1892 .....	44	35
51—Letter, Denney to Harriman, November 7, 1892.....	44	35
52—Letter, Harriman to Denney, November 11, 1892.....	45	36
53—Letter, Hopkins to Denney, November 25, 1892.....	45	36
54—Letter, Harriman to Denney, January 7, 1893.....	45	36
55—Telegram, First national bank to U. S. national bank, 1, 9, 1893.....	46	37
56—Letter, Harriman to Denney, January 9, 1893.....	46	37
57—Letter, Denney to United States national bank, January 11, 1893.....	46	37
58—Letter, Harriman to Denney, January 16, 1893.....	46	37
59—Letter, Hopkins to Roots, January 24, 1893.....	47	38
60—Letter, Smith to United States national bank, January 26, 1893.....	47	38
61—Letter, McAuliffe to Smith, January 30, 1893.....	48	38
62—Letter, Denney to United States national bank, January 27, 1893.....	48	39
63—Letter, Harriman to Denney, February 1, 1893.....	48	39
64—Letter, Harriman to First national bank, February 3, 1893 .....	48	39
65—Letter, Parker to Denney, January 30, 1893.....	49	39
66—Letter, Galbraith to U. S. national bank, 1, 21, 1893.....	49	40
67—Letter, McAuliffe to Galbraith, January 26, 1893.....	49	40
68—Letter, Roots, receiver, to United States national bank, March 9, 1893.	50	40
70—Letter, Roots to United States national bank, March 28, 1893, .....	50	41

Exhibit 71—Letter, Hopkins to Roots, March 31, 1893.....	51	41
72—Letter, Roots to United States national bank, April 13, 1893....	51	42
73—Letter, McAuliffe to Roots, April 18, 1893.....	52	42
74—Telegram, Fletcher to Parker, Jan. 9. Telegram, Bullen to Parker, January 17, 1893.....	52	42
Telegram, First national bank to U. S. national bank, January 18, 1893....	52	42
Telegram, First national bank to U. S. national bank, January 19, 1893....	52	43
75—Telegram, First national bank to U. S. national bank, January 19, 1893....	53	43
Telegram, Bullen to Parker, January 20, 1893.....	53	43
Telegram, Russell to Parker, Jan. 20.	53	43
76—Telegrams, dated January 20, January 24, and February 10, 1893 .....	53	43
Telegram, Johnson to Hopkins, May 10, 1893. ....	54	44
77—Statement of account.....	54	44
Agreement that testimony of Hopkins shall be treated as the testimony of J. H. Parker, Jos. W. Harriman, and John J. McAuliffe .....	55	44
Testimony of M. H. Johnson .....	56	45
Letter, Hearne, cashier, to Bank of Little Rock, 4, 15, 1893.....	56	45
Letter, Hearne, cashier, to Bank of Little Rock, May 1, 1893.....	57	45
Testimony of C. T. Walker.....	60	48
Oscar Davis.....	62	50
Testimony for defendants.....	64	52
Testimony of E. J. Butler.....	64	52
N. Kupferle .....	68	55
C. T. Abeles.....	71	58
M. M. Cohn. ....	72	59
George R. Brown. ....	74	60
James Joyce.....	74	60
C. H. Yost.....	75	62
Plaintiff's request for instructions .....	80	65
Defendant's request for instructions.....	80	65
Defendant's exceptions to court's ruling on request for instructions.....	84	68
Defendant's objection to recovery of certain costs and exception to court's ruling thereon .....	85	69
Certificate of judge to bill of exceptions .....	85	69
Assignment of errors.....	85	69
Citation and acknowledgment of service.....	91	73
Clerk's certificate to transcript.....	92	74
Appearance of counsel for plaintiff in error .....	93	74

	Original	Print.
Appearance of counsel for defendant in error.....	93	75
Motion to certify questions to the Supreme Court.....	94	75
Order denying motion to certify questions to Supreme Court.....	95	76
Stipulation for submission of cause.....	96	77
Order: Cause submitted.....	96	77
Judgment of U. S. circuit court of appeals.....	97	77
Assignment of errors.....	98	78
Petition for writ of error.....	104	82
Writ of error and clerk's return.....	106	83
Citation and acceptance of service.....	108	84
Clerk's certificate to transcript.....	109	85

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1897, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the third day of May, A. D. 1897, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable John A. Riner, district judge.

Attest :

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,  
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Be it remembered that heretofore, to wit, on the eleventh day of August, A. D. 1897, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, plaintiff in error, vs. United States National Bank, defendant in error; which said transcript of record is in the words and figures following, to wit :

2 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judges of the circuit court of the United States for the western division of the eastern district of Arkansas, Greeting :

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, 1897, thereof, between United States National Bank, plaintiff, and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Ark., defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 16th day of August, 1897, to the end that, the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Issued at office, in the city of Little Rock, with the seal of the circuit court of the United States for the western division of the eastern district of Arkansas, dated as aforesaid.

RALPH L. GOODRICH,  
Clerk Circuit Court United States, Western Division  
of the Eastern District of Arkansas.

3 Allowed by—

JNO. A. WILLIAMS, Judge.

Service acknowledged this 19th June, 1897.

RATCLIFFE & FLETCHER,  
Att'ys for Plaintiff.

*Return to Writ.*

UNITED STATES OF AMERICA, } ss :  
Western Division of the Eastern District of Arkansas, }

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and  
[SEAL.] affix the seal of said circuit court, at office, in the city of Little Rock, this 8th day of July, A. D. 1897.

RALPH L. GOODRICH,  
Clerk of said Court.

Endorsed : No. —. United States circuit court, western division of the eastern district of Arkansas. — vs. —. Writ of error to the circuit court of the United States for the western division of the eastern district of Arkansas. Filed 19 day of June, 1897. Ralph L. Goodrich, clerk.

4 Be it remembered that on the 18th day of October, 1893, came into the office of the clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, United States National Bank of New York, by Ratcliffe and Fletcher, Esqrs, its attorneys, and filed therein its complaint against The First National Bank of Little Rock, Arkansas, *et al.*, which complaint is as follows :

United States Circuit Court, Western Division, Eastern (—) of Arkansas.

UNITED STATES NATIONAL BANK OF CITY OF NEW YORK	}
vs.	
FIRST NATIONAL BANK OF LITTLE ROCK and STERLING R. Cockrill, Receiver.	

The said plaintiff, United States National Bank, states that it is a corporation duly incorporated under the laws of the United States and resident, located and doing business in the city of New York,

State of New York, that the defendant First National Bank of Little Rock is a corporation organized under the laws of the United States, resident and located and lately doing business in the city of Little Rock in the western division of the eastern district of Arkansas. Said defendant bank has become insolvent, and the defendant S. R. Cockrill, who is a citizen of Arkansas, and resident in said city of Little Rock, has been appointed receiver of said bank.

On December 7th, 1892, the City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the State of Missouri, its three promissory notes each for five thousand dollars, payable four months after date, with interest at the rate of ten per cent. per annum from maturity until paid, said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff.

That on December 7th, 1892, the McCarthy and Joyce Company, a corporation resident in the city of Little Rock, Pulaski county, Arkansas, and organized and doing business under the laws of Arkansas, executed and delivered to James Joyce, a citizen of the State of Missouri, its two promissory notes each for five thousand dollars, payable to his order at four and five months respectively after date with interest from maturity at the rate of ten per cent. per annum until paid, said Joyce afterwards indorsed said notes to the defendant First National Bank and said bank before maturity

5 and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff, said notes were each at maturity presented at the First national bank in Little Rock, Arkansas, for payment, and payment being refused, they were each duly protested for non-payment, the fees for which amounting to twenty-five dollars were paid by plaintiff. Copies of said notes, with the indorsements thereon, are hereto attached marked 1 to 5 inclusive, and made part hereof, no part of said notes has been paid, and the same have been presented to the receiver of said bank for allowance, which he has refused to do.

Wherefore plaintiff prays judgment for its debt and for all other relief.

RATCLIFFE AND FLETCHER,  
*For Plaintiff.*

The notes and indorsements appear in the bill of exceptions, at pages 13-18 inclusive.

UNITED STATES OF AMERICA, }  
*Western Division of the Eastern District of Arkansas.* }

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 23rd day of October,



anno Domini, one thousand eight hundred and ninety-three, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge presiding and holding said court, the following proceedings were had, to wit:

On October 25, 1893, as follows:

UNITED STATES NATIONAL BANK OF NEW YORK }  
 vs.  
 FIRST NATIONAL BANK OF LITTLE ROCK ET AL. }

Comes the defendant Sterling R. Cockrill, receiver of the First National Bank of Little Rock, by Sanders and Cockrill, Esqrs., his attorneys, and files herein his answer.

Which answer is as follows:

The defendant, Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, for answer to the complaint denies that either of the notes described in the plaintiff's complaint was ever indorsed and delivered to the First national bank; he denies that either of said notes was ever the property of or in the possession of said bank; and denies that the said bank ever indorsed or delivered either of said notes to the plaintiff; he  
 6 denies that said bank ever received any consideration from said plaintiff for any indorsement or delivery of said notes to it.

Wherefore he prays judgment.

GEO. H. SANDERS AND  
 S. R. COCKRILL,  
*Attorneys for Receiver.*

Filed October 25, 1893.

RALPH L. GOODRICH, *Clerk.*

UNITED STATES OF AMERICA }  
*Western Division of the Eastern District of Arkansas.* }

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the ninth day of April, anno Domini, one thousand eight hundred and ninety-four at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit:

On June 6th, 1894, as follows:

Comes S. R. Cockrill, as receiver of the First national bank and files herein his amendment to answer.

Which amendment to answer is as follows:

The receiver for the First National Bank of Little Rock, for amendment to his answer, says that at the time of the maturity of each of the notes sued on herein, the First National Bank of Little Rock had ceased to do business, and was carrying on no business at the banking-house where said notes were payable; that the residence and places of business of the makers of said notes were in the city of Little Rock, but that no demand was made upon either

of said makers for the payment thereof; and that no notice of dishonor was given to any person authorized to receive notice on behalf of the said First national bank at the maturity of said notes. Defendant denies that either of the corporations who appear as makers of said notes ever authorized the execution thereof.

For a further answer, defendant alleges that the capital stock of the plaintiff bank herein was \$500,000; that by the act of Congress under which said bank was incorporated it was prohibited from loaning to any person an amount of money exceeding ten per cent. of said capital stock; that if the notes sued on herein created an indebtedness against the First National Bank of Little Rock, the

7 amount borrowed by said First National Bank of Little Rock from the plaintiff at the time the notes sued on were delivered to the plaintiff exceeded the sum of \$50,000, that the directors of plaintiff bank knowingly permitted its officers to make such excessive loan; that the First national bank was not the owner of said paper at any time that the same was indorsed for accommodation of H. G. Allis, that the First national bank received no benefit therefrom.

Defendant alleges that at the date of the suspension of the First national bank the United States national bank was indebted to it in the sum of \$467.86, that sum then being on deposit in the said United States national bank to the credit of the First National Bank of Little Rock; and that the same has never been paid.

Wherefore, defendant prays that he be discharged from all liability upon the notes sued on herein, and that he have judgment against the plaintiff for the said sum of \$467.86, and interest from the 1st day of February, 1893.

S. R. COCKRILL,  
ASHLEY COCKRILL,  
*For Defendant.*

Filed June 6, 1894.

RALPH L. GOODRICH, *Clerk.*

Which answer is as follows:

8 Said plaintiff for answer to the cross-complaint of the defendant S. R. Cockrill, receiver, says, it is not true that it is indebted to said receiver or to the said First national bank in the sum of \$467.86 or in any other sum whatever.

That at the time said First national bank failed it was indebted to plaintiff in a large amount, to wit, the notes sued upon herein, and plaintiff applied said \$467.86 as a credit upon said indebtedness.

Wherefore plaintiff prays that said cross-complaint be dismissed.

RATCLIFFE AND FLETCHER,  
*For Plaintiff.*

Which demurrer is as follows:

The plaintiff demurs to the amendment to the answer of S. R. Cockrill, receiver herein.

1. Because presentation of the notes sued upon for payment was

not required to be made at any place other than that mentioned in said notes.

2. Because it is not alleged that plaintiff had notice of the alleged want of authority of the officers of the corporations, who made said notes, to execute the same. Nor can the defendant receiver take advantage of any such want of authority.

3. Because plaintiff is not prohibited by law from discounting notes beyond ten per cent. of its capital stock, and if it is, that fact cannot be urged as a defense to this action.

4. Because said amendment to the answer does not state facts sufficient to constitute a defense.

5. Because it is not alleged that plaintiff had any notice that said notes were endorsed for accommodation of H. G. Allis.

6. Plaintiff also demurs to the cross-complaint of defendant, because the same does not state facts sufficient to constitute a cause of action.

RATCLIFFE AND FLETCHER,  
*Attorneys for Plaintiff.*

Filed June 8, 1894.

RALPH L. GOODRICH, *Clerk.*

9

UNITED STATES OF AMERICA, }  
*Western Division of the Eastern District of Arkansas.* }

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 28th day of October anno Domini one thousand eight hundred and ninety-five at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge presiding and holding said court, the following proceedings were had, to wit:

On February 7th, 1896, as follows:

UNITED STATES NATIONAL BANK }  
vs. }  
FIRST NATIONAL BANK OF LITTLE ROCK. }

Comes the defendant by S. R. Cockrill and Ashley Cockrill, Esqrs., its attorneys, and by leave of the court files herein its amendment to answer.

Which amendment is as follows:

*Amendment to Answer.*

In the United States Circuit Court, Western Division of the Eastern District of Arkansas.

UNITED STATES NATIONAL BANK }  
vs. }  
FIRST NATIONAL BANK ET AL. }

By way of amendment to the answer heretofore filed herein defendants allege that the name of the defendant bank was indorsed

on said notes by H. G. Allis for his personal benefit without authority from said bank, that the said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; if said transaction created an indebtedness against the defendant bank, then the total liability of said defendant bank to the plaintiff by virtue thereof, exceeded one-tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business which either the plaintiff  
10 or the defendant bank was authorized to carry on, that the plaintiff is not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank.

Wherefore it prays as in its other answers herein.

S. R. COCKRILL,  
ASHLEY COCKRILL,

*For Defendant.*

Filed February 7th, 1896.

RALPH L. GOODRICH, *Clerk.*

11 UNITED STATES OF AMERICA, }  
*Western Division of the Eastern District of Arkansas.* }

Be it remembered that at a circuit court of the United States of America in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the 12th day of April, anno Domini one thousand eight hundred and ninety-seven, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge, presiding and holding said court, the following proceedings were had, to wit:

On June 18, 1897, as follows:

UNITED STATES NATIONAL BANK

*vs.*

STERLING R. COCKRILL, as Receiver of the First National Bank  
of Little Rock, Arkansas. }

Comes the plaintiff, by Ratcliffe and Fletcher, Esqrs., its attorneys, and comes the defendant, by Cockrill and Cockrill, Esqrs., his attorneys, and, both parties announcing themselves ready for trial, a jury came, to wit, Green Tomsun and eleven others, good and lawful men of the district, who were duly tried, empannelled, and sworn well and truly to try the issues joined between the United States National Bank and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, and a true verdict

give according to the law and the evidence; and the jury, having heard all the evidence and having been directed by the court to return a verdict in favor of the plaintiff against the said receiver, return the following verdict, viz:

"We, the jury, find the issues in favor of the United States National Bank against Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, and assess the plaintiff's damages at twenty-four thousand five hundred and thirty-two dollars and fourteen cents (\$24,532.14)."

It is therefore considered, ordered, and adjudged that the United States national bank have and recover of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, the sum of twenty-four thousand five hundred and thirty-two dollars and fourteen cents (\$24,532.14), together with the costs; that said claim be allowed by said receiver, to be by him paid in accordance with the acts of Congress in that behalf provided.

(Signed)

JNO. A. WILLIAMS,  
U. S. Dist. Judge.

On June 19th, 1897, as follows:

UNITED STATES NATIONAL BANK OF NEW YORK }  
vs.  
S. R. COCKRILL, Receiver, &c. }

Comes the defendant, by S. R. Cockrill and Ashley Cockrill, Esqrs., his attorneys, and files herein his bill of exceptions, which is signed by the court; also prayer for writ of error and assignment of errors; and the writ of error being allowed by the court the same is issued and filed herein, together with citation, which is signed by the court. It appearing that said Cockrill is receiver by virtue of appointment of the Comptroller of the Currency, in accordance with the act of Congress, it is ordered that he prosecute his *suit* of error without bond.

Which bill of exceptions is as follows:

*Bill of Exceptions.*

UNITED STATES NATIONAL BANK OF NEW YORK }  
vs.  
S. R. COCKRILL, Receiver. }

This cause coming on for trial this 18th day of June, 1897, the plaintiff, to sustain the issues on its part, introduced the following testimony, to wit:

Counsel for plaintiff offered to introduce in evidence the notes sued on, copies of which are attached to the complaint, with proofs of protest. Counsel for the defendant object to the introduction of the notes, as they are not shown to have been the property of the First national bank or to have been indorsed by any one authorized to indorse them for the First national bank.

Subject to these objections, the court permitted the notes and proofs of protest to be introduced. Attorneys for defendant withdrew all objections to the notice of protest and abandoned the defense upon that ground. Defendant at the time excepted to the court's ruling. Said notes, with the endorsements thereon, are as follows:

\$5,000. 34131. LITTLE ROCK, ARK., Dec. 7th, 1892.

Four months after date we, or either of us, promise to pay to the order of G. R. Brown & H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent. per annum, until paid.

CITY ELECTRIC ST. R'Y CO.  
H. G. BRADFORD, *P't.*

W. H. SUTTON, *Sec'y.*

No. A, 73485. Due Apr. 7-10, '93.

The following indorsements appear on the above note: Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Ark.; H. G. Allis, *p't.* Pay W. D. Hearn, cashier, or order, for collection. H. G. Hopkins, cashier. Protested for non-payment April 10, 1893. A. S. Reaves, notary public. Fees, \$4.94. Protested.

\$5,000. 34130. LITTLE ROCK, ARK., Dec. 7th, 1892.

Four months after date we, or either of us, promise to pay to the order of Geo. R. Brown & H. G. Allis five thousand dollars, for value received, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent. per annum, until paid.

CITY ELECTRIC ST. R'Y CO.,  
By H. W. BRADFORD, *P't.*

W. A. SUTTON, *Sec'y.*

No. A, 73484. Due Apr. 7-10, '93.

14 The following indorsements appear on the above note: Geo. R. Brown, H. G. Allis, First National Bank of Little Rock, Ark.; H. G. Allis, *p't.* Pay W. D. Hearn, cashier, or order, for collection. H. G. Hopkins, cashier. Protested for non-payment April 10, 1893. A. S. Reaves, notary public. Fees, \$4.90. Protested.

\$5,000. 34129. LITTLE ROCK, ARK., Dec. 7, 1892.

Four months after date we, or either of us, promise to pay to the order of G. R. Brown & H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent. per annum, until paid.

CITY ELECTRIC ST. R'Y CO.,  
By H. G. BRADFORD, *P't.*

W. H. SUTTON, *Sec'y.*

No. A, 73483. Due Apr. 7-10, '93.

The following indorsements appear on the above note: Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Ark.; H. G. Allis, p't. Pay W. D. Hearn, cashier, or order, for collection. H. G. Hopkins, cashier. Protested for non-payment April 10, 1893. A. S. Reaves, notary public. Fees, \$4.90. Protested.

\$5,000. 34128. LITTLE ROCK, ARK., Dec. 7, 1892.

Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent. per annum, until paid.

McCARTHY & JOYCE CO.  
GEO. MANDLEBAUM,  
*Sec'y & Treas.*

A, 73477.

No. 2. Due Apr'l 7-10, '93.

The following indorsements appear on the above note: James Joyce, H. G. Allis, First National Bank, Little Rock, Ark.;  
15 H. G. Allis, p't. Pay W. D. Hearn, cashier, or order, for collection. H. G. Hopkins, cashier. Protested for non-payment April 10, 1893. A. S. Reaves, notary public. Fees, \$4.90. Protested.

\$5,000. 34693. LITTLE ROCK, ARK., Dec. 7th, 1892.

Five months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent. per annum, until paid.

McCARTHY & JOYCE CO.  
GEO. MANDLEBAUM,  
*Sec'y & Treas.*

A, 73476.

No. 3. Due May 7-10, '93.

The following indorsements appear on the above note: James Joyce, H. G. Allis, First National Bank, Little Rock, Ark.; H. G. Allis, p't. Pay W. D. Hearn, cashier, or order, for collection. H. G. Hopkins, cashier. Protested for non-payment May 10, 1893. A. S. Reaves, notary public. Fees, \$4.94. Protested.

16 Counsel for plaintiff read the depositions of witnesses, as follows:

*Deposition of Henry C. Hopkins.*

Ques. 1. State your name, reside- and occupation.

Ans. Henry C. Hopkins, New York city; cashier United States national bank, New York.

2. What official relation do you hold with The United States



National Bank of New York, plaintiff in this case, and what official relation did you hold with the said bank during the year 1892?

Ans. Cashier of the plaintiff bank, and held that position during the year 1892.

3. Give a detailed account of the business transactions between the United States national bank and the First National Bank of Little Rock during the year of 1892, commencing with the first negotiations between said banks and up to the time when they ceased to do business with each other, and attach to your deposition (or if attached to other depositions, refer to same) any letters, telegrams or other documents or the copies thereof, when you have not the originals, relating to the business between said banks and especially those which relate to the notes in controversy in this case. Explain fully.

Ans. Our business relations with the First National Bank of Little Rock, Arkansas, began by our writing them under date of June 21st, 1892, inviting them to do business with us as shown by Exhibit 1, annexed hereto, in which we offered to give them accommodation in the form of rediscounts; and in reply to

17 which, on June 24th, 1892, the First National Bank of Little Rock, Arkansas, sent us about \$50,000 of their bills discounted, as shown by their letter of June 24th, 1892, Exhibit 2. They had neglected to indorse these notes, and we returned them for that purpose, as shown by telegram and letter of June 27th, 1892, Exhibits 3 and 4; after having first discounted them in anticipation of having the notes duly indorsed by the First National Bank of Little Rock, Arkansas. Also on June 27th, 1892—as per Exhibit 5—we advised them of proceeds of these notes, which were discounted in anticipation of getting said bank's indorsement. We received these notes back from them, properly indorsed, in their letter of July 1st, 1892, Exhibit 6; receipt of which we acknowledged July 6th, 1892, Exhibit 7. On July 6th, 1892, we offered to discount \$50,000 more for the First National Bank of Little Rock, Arkansas, as per telegram, Exhibit 8; which offer they accepted in their telegram—Exhibit 9—confirming same in their letter of July 9th, 1892—Exhibit 10—in which they enclosed sundry notes aggregating about \$50,000.00. Advice of proceeds of this discount is shown by our letter of July 13th, 1892, Exhibit 11. In this letter of advice, we call attention to some little irregularities, the correction of which is shown in our subsequent letter of July 21st, 1892, Exhibit 12.

On July 26th, 1892, we offered them \$50,000.00 more rediscounts as per Exhibit 13. In their letter of July 29th, 1892, they enclosed us a further batch of notes, aggregating about \$50,000.00, as shown by Exhibits 14 and 15. Advice of proceeds of this discount is shown by Exhibit 16.

On October 31st, 1892, they sent us their bills discounted for about \$24,000.00 for rediscount, as shown by Exhibit 17. We wired them that proceeds were at their credit on November 3rd, 1892, Exhibit 18, and gave them formal advice of the same, on the same date, Exhibit 19.



On November 25th, 1892, they asked for further discounts to the extent of \$25,000.00, Exhibit 20. This we promised to give in our letter of November 28th, 1892, Exhibit 21. In accordance therewith, they forwarded us the paper on December 13th, 1892, Exhibit 22; the formal advice of proceeds of which is shown by our letter of December 16th, 1892, Exhibit 23; and our telegram of December 17, 1892, Exhibit 24. One of these notes which we discounted was out of order and was returned in this letter (of December 16th, 1892) for corrections, and was reforwarded to us as shown by their letter of December 20th, 1892, Exhibit 25, and our acknowledgment, Exhibit 26.

On December 21st, 1892, the First National Bank of Little Rock, Arkansas, asked us to rediscount \$30,000.00 of country banks' paper secured by cotton, Exhibit 27. This we agreed to do, as shown by telegram and letter of December 21st, 1892, Exhibit 28, requesting them, in view of the panic in Wall street, to make their demands as light as possible, and inadvertently referring to the proposed rediscount as a "loan;" the proposition being, however, that we rediscount notes of the country correspondents of the First National Bank of Little Rock, Arkansas, to wit: the Bank of Batesville and the People's Exchange Bank of Russellville. This paper was subsequently sent us in their letter of December 21st, 1892—Exhibit 29—to wit, \$25,000.00 of the Bank of Batesville paper secured by cotton; and \$5,000.00 of People's Exchange Bank of Russellville paper.

These were rediscounted by us and *advice* of proceeds credited on December 27th, 1892, Exhibit 30.

During the period covered by this answer, we had the usual business transactions with the First National Bank of Little Rock, Arkansas; they sending us remittances for their credit almost daily, and continually checking on us, as shown by copy of account current herewith, Exhibit 77.

Subsequent to the discount given the First National Bank of Little Rock, on or about December 27th, 1892, there were no transactions between the banks about which any controversy has arisen and no special mention, therefore, is made regarding them. I further attach hereto letters and telegrams received from the First national bank and copies of our letters and telegrams in reply, Exhibits 31 to 65, inclusive, which shows the transactions carried on between the First national bank and ourselves. I further attach Exhibits 66 to 76 inclusive, which are copies of correspondence between the Treasury Department, the bank examiner, the receiver of the First National Bank of Little Rock, Arkansas, and ourselves.

4. Were any of the dealings between said banks other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

Ans. No.

5. Were the notes in controversy received and rediscounted by the United States national bank in any way other than in the usual course of business or different from any of the other notes redis-

counted by it for the First National Bank of Little Rock, Arkansas?

Ans. No.

6. Did the United States national bank have any notice or information whatever that the notes in controversy had not been regularly received by the First national bank and by it offered for rediscount in the usual course of business?

Ans. No.

7. Did the United States national bank have any notice or information that the notes in controversy were offered by the First National Bank of Little Rock for discount for the benefit of any person other than the First national bank or that any other person was interested in the proceeds of said notes?

Ans. No.

8. Did the United States national bank in its correspondence or dealings at any time treat with or recognize H. G. Allis and W. C. Denney or S. B. Smith in any other capacity than as representing the First national bank?

Ans. No; we never had any business transactions whatever with either H. G. Allis, W. C. Denney, or S. B. Smith, personally. Our transaction- were solely with the First national bank.

9. Were the correspondence and transactions carried on by H. G. Allis and W. C. Denney as you have disclosed, such as are usual for the president and cashier of a United States national bank to carry on and exercise?

Ans. Yes.

10. By whom were the proceeds of the various notes rediscounted as you have testified, withdrawn from the United States national bank?

Ans. First National Bank of Little Rock, Arkansas, in the regular course of business.

11. Was any part of the proceeds of any of the notes rediscounted by the First National Bank of Little Rock with the United States national bank, withdrawn by any person other than the regular officers of the First national bank and in the usual course of business?

Ans. No.

*Cross-interrogatories.*

No. 1. In the transaction of Aug. 1st, 1892, did H. G. Allis telegraph you for this loan? Please attach copy of his telegram.

Ans. No; on July 26th, 1892, we telegraphed the First National Bank of Little Rock, Arkansas, offering them \$50,000.00 more rediscounts, Exhibit 13; to which the First National Bank of Little Rock, Arkansas, replied under date of July 29th, 1892, accepting the offer and forwarding notes for rediscount, Exhibits 14 and 15.

No. 2. How much was H. G. Allis or the First national bank indebted to you (the U. S. nat'l bank) upon the consummation of this transaction?

20

Ans. H. G. Allis was not in any way indebted to us. We never had any personal transactions with him. Before the

proceeds of this discount, viz.: \$49,263.84, were placed to the credit of the First National Bank of Little Rock, Arkansas, it had a credit balance with us of \$7,672.11, and under discount \$101,164.81. After the discount was made and the proceeds \$49,263.84 placed to its credit, its balance with us was \$57,030.95, and its liabilities for bills rediscounted, \$151,199.17.

No. 3. What amount of credit did you extend to H. G. Allis or the First national bank at any one time?

Ans. As stated above, we never extended any credit to H. G. Allis. The largest amount of credit extended at any one time to the First National Bank of Little Rock, Arkansas, was \$151,199.17, on bills rediscounted, as stated above.

No. 4. How much was either indebted to the U. S. nat. bank when the transaction of August 1st was consummated?

Ans. I have answered this question in answering cross-interrogatory No. 2.

No. 5. How much including that transaction?

Ans. I have answered this question in answering cross-interrogatory No. 2.

No. 6. How much when the transactions of Nov. 4th, 1892, was consummated?

Ans. There was no discount given on November 4th, 1892, but there was on November 3rd, and before the proceeds of this discount, viz.: \$24,176.60 were placed to the credit of the First National Bank of Little Rock, Arkansas, on November 3rd, 1892, it had a credit balance with us of \$30,812.33, and under discount \$74,548.18.

No. 7. How much including that transaction?

Ans. After the discount on November 3rd was made and proceeds \$24,176.60 placed to its credit, its balance with us was \$44,978.93, and its liability on rediscounts \$98,961.23.

No. 8. How much was either H. G. Allis or the First national bank indebted to the U. S. national bank when the notes in suit were discounted by the U. S. national bank?

Ans. As stated above H. G. Allis was never indebted to the United States national bank in any sum whatever. Before the proceeds, \$31,871.27 were placed to the credit of the First National Bank of Little Rock, Arkansas, on December 16th, 1892, it had a credit balance with us of \$13,566.10; and under discount \$34,587.49. After the discount was made, December 16th, 1892, and proceeds \$31,871.27 were placed to the credit of the First National Bank of Little Rock, Arkansas, it had a credit balance with us of \$51,760.12; and under discount with us \$67,087.49.

No. 9. Who endorsed the notes purchased by the U. S. national on or about June 27th, 1892?

21 Ans. The question is asked in reference to notes "purchased" by the United States national bank on or about June 27th, 1892. These notes were discounted by us for the First National Bank of Little Rock, Arkansas, not purchased. Ten of the twelve notes in question were to the order of the First National Bank of Little Rock, Arkansas, and indorsed by them; and the

note of J. E. Briscoe \$1,100.40, due October 4th, 1892, was indorsed by the McCarthy & Joyce Company; and the note of the Keating Implement & Machine Company, \$1,778.67, due October 18th, 1892, was indorsed by the Thomas Manufacturing Company.

No. 10. Were they indorsed by the First National Bank of Little Rock, Ark., when they were first received by the U. S. national bank?

Ans. No; inadvertently they had been forwarded to us without the indorsement of the First National Bank of Little Rock, Arkansas. We received the twelve notes, aggregating \$50,728.00 from the First National Bank of Little Rock, Arkansas, in their letter of June 24th, 1892, Exhibit 2. We wired them that these notes were undorsed, but that we had discounted them, and were returning them for their indorsement, confirming our telegram to that effect, Exhibit 3; and returning the notes for indorsement—see our two letters of June 27th, 1892, Exhibits 4 and 5. These notes were subsequently returned us properly indorsed by the First National Bank of Little Rock, Arkansas, in their letter of July 1st, 1892, Exhibit 6.

No. 11. Were they indorsed by any other person at that time?

Ans. I have answered that question when I answered cross-interrogatory No. 9.

No. 12. If so, by whom?

Ans. I answered this question when I answered cross-interrogatory No. 9.

No. 13. When was the name of the First national bank indorsed on said notes and by whom?

Ans. I have already answered this question in answering cross-interrogatory No. 10. I know that the notes were properly indorsed by one of the duly authorized officers of the First national bank, but as the notes are not now in our possession, I am unable to state the name of the officer.

No. 14. Who indorsed the second batch of notes purchased by the U. S. national bank in July, 1892, aggregating about \$50,000.00?

Ans. The First National Bank of Little Rock, Arkansas (in addition to the indorsements previously made on the notes) indorsed the notes discounted (not purchased) by the United States national bank, July 13th, 1892, to wit:

22	Name.	Indorser.	Due.	Amount.
	Press Printing Co.....	Geo. R. Brown.....	Oct. 1st, '92	\$2,500.00
	Merchants' Transfer Co.	H. C. Bateman, Geo. McLean.	Oct. 7th, '92	2,000.00
	J. E. Briscoe.....	McCarthy & Joyce Co.....	Nov. 4th, '92	339.75
	Conway Scott.....	McCarthy & Joyce Co.....	Nov. 5th, '92	2,857.16
	Press Printing Co.....	Geo. R. Brown.....	Nov. 5th, '92	5,000.00
	McCarthy & Joyce Co...	James Joyce, George Mandelbaum.	Nov. 10th, '92	5,000.00
	Thomas Manfg. Co. ....	D. H. Thomas.....	Nov. 10th, '92	5,136.66
	S. A. Wiggins.....	McCarthy & Joyce Co.....	Dec. 4th, '92	3,160.00
	Draft on Talbot & Sons..	Thomas Mfg. Co.....	Dec. 4th, '92	2,146.85

No. 15. Were they indorsed by the First National Bank of Little Rock, Ark., when they were first received by the U. S. national bank?

Ans. Yes.

No. 16. Were they indorsed by any other person at the time?

Ans. I have answered that question in answering cross-interrogatory No. 14.

No. 17. When was the name of the First national bank indorsed on said notes and by whom?

Ans. I have already answered that question in answering cross-interrogatory No. 10. I know that the notes were properly indorsed by one of the duly authorized officers of the First national bank, but as the notes are not now in our possession I am unable to state the name of the officer.

No. 18. Have you attached the letter from H. G. Allis as president, to the United States national bank, dated July 29th, 1892, to your deposition? If not please attach the same.

Ans. Yes, the letter is attached—Exhibit- 14 and 15.

No. 19. Have you given a detailed statement of your transactions in full with the First national bank?

Ans. Yes, as shown by the statement of the account, Exhibit 77.

No. 20. What was the capital stock of the United States National Bank of New York in 1892?

Ans. \$500,000.00.

(Signed)

H. C. HOPKINS.

23 EXHIBITS TO THE DEPOSITION OF H. C. HOPKINS.

(Copy.)

NEW YORK, *June 21, 1892.*

W. C. Denney, Esq., cashier, Little Rock, Ark.

DEAR SIR: Can we not do business with your good bank? We should like to enroll your name upon our books, and we think the relation, if once established, could be made satisfactory to you in every particular; at any rate it would be our earnest endeavor to make it so.

We will give you 2% on your daily balances, granting you our best collection facilities, taking all your foreign items east of the Mississippi river and crediting them to your account immediately without charge.

If you will send on \$50,000 of your good, short-time, well-rated bills receivable we will be pleased to place them to your credit at 4%.

We are anxious to do business with your bank, having warmly and favorably known of it, and should be pleased to hear from you in reference to the above proposition.

Yours very truly,

J. W. HARRIMAN,  
2nd Ass't Cashier.

This is the paper marked "1," referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman, and John J. McAuliffe hereto annexed.

HY. H. WHITMAN,  
*Notary Public.*

H. C. Hopkins, J. H. Parker, J. W. Harriman, J. J. McAuliffe.

First National Bank of Little Rock, Ark.

**JUNE 24, 1892.**

Mr. Joseph W. Harriman, ass't cashier United States national bank,  
New York city.

DEAR SIR: We have your favor of the 21st inst., inviting us to open an account with you.

The writer became acquainted with your president in the Southern Society of New York, and has long known him by reputation.

You have offered us a rate of interest that we have been endeavoring to get for a number of years past, but have never succeeded in doing so. This rate of interest will enable us to take care of our country banks in remunerative shape to both, and we feel, since you are the first to have the courage to offer four per cent. money in southern territory, that we should meet you in like spirit.

I inclose herein \$50,000 of our best short-time, well-rated bills, and also the signatures of our officers. Our average balance with you will be above \$10,000, and I trust the connection may be a long and satisfactory one.

After the maturity of this paper we shall have nothing to offer you in the way of rediscounts, except the paper of country banks, and I hope you can see your way clear to continue this 4 per cent. rate during our cotton season.

Kindly wire us proceeds to our credit, if the paper is satisfactory. The collaterals, recited in the notes enclosed, we hold subject to your order.

Yours very truly,

H. G. ALLIS, *President.*

City Electric Street R'y Co. . . . .	\$2,500.00, due Oct. 25th, '92.
" " " " " . . . . .	2,500.00, due Oct. 25th, '92.
City Electric Street R'y Co. . . . .	2,500.00, due Oct. 25th, '92.
J. E. Biscoe. . . . .	1,140.00, due Oct. 4th, '92.
Ferguson Lumber Co. . . . .	2,000.00, due Oct. 18th, '92.
Keating Implement & Machine Co..	1,778.67, due Oct. 18th, '92.
Little Rock cotton mills . . . . .	5,133.33, due Oct. 13th, '92.
H. M. Cooper and others. . . . .	4,715.60, due Oct. 5th, '92.
M. M. Cohn & Co. . . . .	6,000.00, due Sept. 17th, '92.
Gus Blass & Co. . . . .	10,000.00, due Sept. 29th, '92.
Ouachita Valley bank . . . . .	10,000.00, due Aug. 13th, '92.

**Total..... \$50,728.00**

This is the paper marked "2 P," referred to in the depositions of Henry C. Hopkins, James H. Farker, Joseph W. Harriman and John J. McAuliffe hereto annexed.

HY. H. WHITMAN,  
*Notary Public.*

H. C. Hopkins, J. H. Parker, J. W. Harriman, J. J. McAuliffe.

*Telegram.*

(Copy.)

NEW YORK, June 27, 1892.

First national bank, Little Rock, Ark. :

Notes in yours of twenty-fourth unindorsed—have discounted same and return to you tonight for indorsement.

UNITED STATES NATIONAL BANK.

Collect.

25 This is the paper marked "3," referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman and John J. McAuliffe hereto annexed.

HY. H. WHITMAN,  
*Notary Public.*

EXHIBIT 4.

(Copy.)

NEW YORK, June 27, 1892.

H. G. Allis, Esq., cashier, Little Rock, Ark.

DEAR SIR: Your favor of the 24th, inclosing us notes amounting to \$50,000 for discount and credit to your account, duly received.

We welcome this relation with great pleasure, and we trust that the account will prove to be mutually satisfactory and beneficial in every particular, at any rate, it will be our earnest endeavor to make it so.

We note the remarks in your letter of the above date and appreciate that you endeavor at all times to get as low a rate as possible for your accommodations; but we do not wish to open this relation under a misapprehension or misunderstanding in any particular. Money being easy just at the time we wrote you on the 21st, we are now enabled to give you the proffered accommodation at 4%, but we do not wish to bind ourselves to this always; for you will readily understand that when the money market tightens our rates will be higher, but we will never charge you over 6%.

The notes which you forwarded us were unindorsed and we have wired you to this effect today. We have discounted the same and detailed statement will follow under separate cover, and have returned the notes to you for indorsement.

We will also see that you get our collections upon Little Rock and vicinity. Will you kindly send on a list of your par points? The signatures of your officers enclosed we have placed on file.

Yours very truly,

H. C. HOPKINS, *Cashier.*



## EXHIBIT 5.

Copy. Registered.

NEW YORK, June 27th, 1892.

H. G. Allis, Esqr., president, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in favor of the 24th inst., and proceeds of same placed to your credit:

26 Ouachita Valley bank, due Aug. 13.	\$10,000,	disc't	\$52.22
M. M. Cohn & Co. <i>et al.</i> , due Sept. 7..	6,000,	disc't	48.00
Gus Blass & Co., due Sept. 29.....	10,000.00,	disc't	104.44
J. E. Biscoe, due Oct. 4.....	1,100.40,	disc't	12.10
Henry M. Cooper <i>et al.</i> , due Oct. 5.....	4,715.60,	disc't	52.40
Little Rock cotton mills, due Oct. 13.....	5,133.33,	disc't	61.60
Ferguson Lumber Co. <i>et al.</i> , due Oct. 18..	2,000,	disc't	25.11
Keating Implement and Machine Co., due Oct. 18.....	1,778.67,	disc't	22.33
Dickenson Hardware Co., due Oct. 25.....	2,500.00,	disc't	33.33
City Electric St. R'y Co., due Oct. 25.....	2,500.00,	disc't	33.33
City Electric St. R'y Co., due Oct. 25.....	2,500.00,	disc't	33.33
Do. due Oct. 25.....	2,500.00,	disc't	33.33

Amount of notes..... \$50,728.00

Less discount at 4 %..... 511.52

Proceeds. .... \$50,216.48

We enclose same herewith under registered cover for your indorsement and return to us.

Yours truly,

JNO. J. McAULIFFE,

*Ass't Cashier.*

## EXHIBIT 6.

The First National Bank of Little Rock, Ark.

JULY 1, 1892.

United States national bank, New York city.

GENTLEMEN: Inclosed herein paper as follows, received this morning in your favor of the 27th, which we have properly indorsed and return:

Ouachita Valley bank, due Aug. 13th.....	\$10,000.00
M. M. Cohn & Co. <i>et al.</i> , due Sept. 17th.....	6,000.00
Gus Blass & Co., due Sept. 29th.....	10,000.00
J. E. Biscoe, due Oct. 4th.....	1,100.40
Henry M. Cooper <i>et al.</i> , due Oct. 5th.....	4,715.60
Little Rock cotton mills, due Oct. 13th.....	5,133.33
Ferguson Lumber Co. <i>et al.</i> , due Oct. 18th.....	2,000.00
Keating Implement & Machine Co., due Oct. 18th.....	1,778.67
Dickenson Hardware Co., due Oct. 20th.....	2,500.00



City Electric St. R'y Co., due Oct. 25th.....	2,500.00
City Electric St. R'y Co., due Oct. 25th.....	2,500.00
City Electric St. R'y Co., due Oct. 25th.....	2,500.00

---

 \$50,728.00

Yours very truly,

H. G. ALLIS, *President*.

27

EXHIBIT 7.

Copy.

NEW YORK, *July 5th*, 1892.

H. G. Allis, Esq., president, Little Rock, Ark.

DEAR SIR: Your favor of the 1st enclosing following notes indorsed as requested in ours of the 27th ulto., duly received:

Ouachita Valley bank, due Aug. 13.....	\$10,000.
M. M. Cohn & Co. <i>et al.</i> , due Sept. 7.....	6,000.
Gus Blass & Co., due Sept. 29.....	10,000.
J. E. Biscoe, due Oct. 4.....	1,100.40
Henry M. Cooper <i>et al.</i> , due Oct. 15.....	4,715.
Little Rock cotton mills, due Oct. 13.....	5,133.
Ferguson lumber mills, due Oct. 18.....	2,000.
Keating Implement & Machine Co., due Oct. 18....	1,778.
Dickenson Hardware Co., due Oct. 25.....	2,500.
City Electric St. R'y Co., due Oct. 25.....	2,500.
Do. do. due Oct. 25.....	2,500.
Do. do. due Oct. 25.....	2,500.

Yours truly,

JNO. J. McAULIFFE,

*Ass't Cashier.*

EXHIBIT 8.

(Telegram.)

Copy.

NEW YORK, *July 6th*, 1892.

First national bank, Little Rock, Ark.:

Will give you additional fifty thousand on short-time, well-rated bills discounted at five per cent. Money rates are little firmer. Answer if wanted.

U. S. NAT. BANK.

EXHIBIT 9.

LITTLE ROCK, ARK., *July 6*, 1892.

United States nat. bank, N. Y.:

We can use fifty thousand additional at five per cent.; will send bills tomorrow.

FIRST NAT. BANK.

## EXHIBIT 10.

LITTLE ROCK, ARK., *July 9th, 1892.*

United States nat'l bank, New York city.

DEAR SIR: To your telegram asking if we could use \$50,000 additional at 5% on short-time, well-rated bills we replied that we could and would send the paper, and enclosed, as stated hereunder, prime paper amounting to \$50,301.88, the proceeds of which please place to our credit and advise. We commence sending you, Monday, an equal division of our New York business, which in point of items will be light until crop-moving time.

Yours truly,

H. G. ALLIS, *Pr.*

71924	Biscoe.....	\$3,341 90
71905	Willbanks .....	1,026 40
71883	Oliver.....	2,100 00
71935	Press Pr't'g Co.....	2,500 00
71912	C. J. Lincoln & Co.....	3,000 00
71911	Wilson & Webb Co. ....	2,000 00
71919	M'ch'ts' Trans. Co.....	2,000 00
71932	Abeles & Co.....	2,000 00
71892	Ferguson Lumb. Co.....	4,000 00
71901	Conway Scott.....	2,857 15
71920	D. H. Thomas.....	5,000 00
71931	Mc & J. Co.....	5,000 00
71939	Press Pr't'g Co.....	5,000 00
71699	S. A. Wiggins .....	3,156 25
71933	T. H. Bunch.....	5,173 33
35583	Talbot & Sons.....	2,146 85

Total..... \$50,301 88

Collaterals recited in numbers 71883 and 71933 are held subject to order of the United States national bank.

H. G. ALLIS, *Pr.*

## EXHIBIT 11.

Copy. Registered.

NEW YORK, *July 13th, 1892.*

H. G. Allis, Esqr., president, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in favor of the 9th inst., and (proceeds) of same placed to your credit:

Geo. B. Williams <i>et al.</i> , due Sept. 29.....	\$1,026.40,	dis. \$11.12
J. E. Oliver, due Sept. 30.....	2,100.	dis. 23.05
Press Pr't'g Co., due Oct. 1.....	2,500.	dis. 27.78
C. J. Lincoln & Co., due Oct. 7. ....	3,000.	dis. 35.83
Merchants' Trans. Co., due Oct. 7.....	2,000.	dis. 23.90
Wilson & Webb Sta. Co., due Oct. 7.....	2,000.	dis. 23.90
Chas. T. Abeles & Co. <i>et al.</i> , 9.....	2,000.	dis. 24.45

J. E. Biscoe, due Nov. 4.....	3,339.74, dis.	52.91
Ferguson Lum. Co., due Nov. 5.....	4,000. dis.	63.90
Conoway Scott, due Nov. 5....	2,857.15, dis.	45.64
Press Pr'tg Co., due Nov. 5....	5,000. dis.	79.86
McCarthy & Joyce, due Nov. 10.....	5,000. dis.	83.33
Thomas Manf. Co., due Nov. 10.....	5,136.67, dis.	85.61
S. A. Wiggins, due Dec. 4.....	3,160. dis.	63.20
Thomas Manf. Co., due Dec. 4.....	2,146.85, dis.	42.94
T. H. Bunch, due Dec. 10.....	5,170. dis.	107.71

Amount of notes..... \$50,436.81

Less discount at 5% ..... 795.13

Proceeds..... \$49,641.68

We enclose under registered cover C. J. Lincoln Co. note \$3,000, maturing Oct. 7th, for the insertion of "days;" note reads "ninety after date." Please have same corrected and return to us.

Note of Thomas Mfg. Co., due Nov. 10th, draws interest at the rate of 8%, and we have calculated same as \$5,136.67.

Note of S. A. Wiggins, maturing Dec. 4, we calculated as \$3,160, being corrected amount of same.

Note of T. H. Branch, maturing Dec. 10th, we calculate as \$5,170.

Note of J. E. Biscoe, maturing Nov. 4th, we calculate as \$3,339.74.

Yours truly,

JNO. J. MCAULIFFE,

*Ass't Cashier.*

#### EXHIBIT 12.

Copy.

NEW YORK, *July 21st*, 1892.

S. B. Smith, Esq., ass't cashier, Little Rock, Ark.

DEAR SIR: Your favor of the 18th inst., enclosing C. J. Lincoln Co. note \$3,000, maturing Oct. 7th, 1892, completed as per our letter of the 13th inst., duly received.

Yours truly,

JNO. J. MCAULIFFE,

*Ass't Cashier.*

#### EXHIBIT 13.

(Telegram.)

Copy.

NEW YORK, *July 26th*, 1892.

First national bank, Little Rock, Ark.,

Can take fifty thousand more of your well-rated bills discounted at five per cent.

U. S. NAT. BANK.

## EXHIBIT 14.

LITTLE ROCK, ARK., July 29, 1892.

United States national bank, New York city.

GENTLEMEN: Your telegram of the 26th, saying you could take \$50,000 more short-time, well-rated paper, I placed before our board today.

(Whioe) it is two weeks earlier than we need it, on account of the rate, we will take it now, and I enclose herein paper as listed below; amount \$50,089.93.

Yours very truly,

H. G. ALLIS, *President*.

We hold collaterals subject to your order, see (pencil) notations on paper for rating.

H. G. ALLIS, *Pr*.

## EXHIBIT 15.

City Electric St. R'y Co.....	\$2,500.00 due Nov. 2, 1892.
City Electric St. R'y Co .....	2,500.00 due Nov. 5, 1892.
N. Kupferle... ..	5,000.00 due Nov. 8, 1892.
D. H. Thomas.....	900.00 due Nov. 22, 1892.
Ferguson Lumber Co.....	2,000.00 due Nov. 26, 1892.
O. B. Field.....	750.00 due Nov. 26, 1892.
F. D. Clark.....	750.00 due Nov. 26, 1892.
Charles T. Ables.. ..	750.00 due Nov. 26, 1892.
W. T. Wilson.....	750.00 due Nov. 26, 1892.
Dickenson Hardware Co.....	2,500.00 due Nov. 30, 1892.
McCarthy (?) Joyce Co.....	5,163.33 due Dec. 13, 1892.
McCarthy & Joyce Co .. ..	5,174.64 due Dec. 23, 1892.
Wilson & Webb Sta. Co.....	5,000.00 due Dec. 4, 1892.
.....	5,000.00 due Dec. 18, 1892.
James K. Jones.....	4,000.00 due Oct. 3, 1892.
Capital Construction & Inv't Co....	4,000.00 due Oct. 4, 1892.
Keating Implement & Machine Co..	3,296.59 due Oct. 18, 1892.
Total.....	\$51,124.93

31

## EXHIBIT 16.

Copy.

NEW YORK, Aug. 1st, 1892.

H. G. Allis, Esqr., president, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of the 29th ult. and proceeds of same placed to your credit;

James K. Jones	due Oct. 5..	\$4,000.	dis. \$36.11	exc. \$8.24
Keating Impl. & Mach. Co. "	18..	4,296.59	35.71	
Capital C. & Invest. Co. 222 "	4..	4,000.	35.56	
City Elec. St. R'y Co. due Nov.	5..	2,500.	33.33	
" " " " " "	5..	2,500.	33.33	
N. Kupferle	" 8..	5,000.	68.75	
D. H. Thomas	" 22..	900.	14.13	
Ferguson Lbr. Co.	" 23..	2,000.	31.67	
W. G. Wilson	" 25..	750.	12.19	
Chas. F. Abeles	" 26..	750.	12.19	
F. D. Clarke	" 26..	750.	12.19	
O. B. Fields	" 26..	750.	12.19	
Dickenson Hard. Co.	" 30..	2,500.	42.01	
Wilson & Webb Sta. Co. Dec.	4..	5,000.	86.81	
McCarthy & J. Co.	" 13..	5,163.33	96.16	
Wilson & Webb Sta. Co. "	18..	5,000.	96.53	
McCarthy & J. Co.	" 23..	5,174.44	103.48	

Amount of notes..... \$50,034.36

Less dis. at 5%..... \$762.28

Exchange..... 8.24

770.52

Proceeds ..... \$49,263.84

Yours truly,

JNO. J. MCAULIFFE,

*Ass't Cashier.*

# EXHIBIT 17.

LITTLE ROCK, ARK., Oct. 31, 1892.

United States national bank, New York city.

GENTLEMEN: I enclose herein for discount and credit \$24,413.05; in other words we desire to renew this amount of our November maturities.

Our crop, as you know, is six weeks late, and we have to renew all October paper. The price, however, is good and collections for next month will be very satisfactory.

32 We trust that you can accommodate us in this matter, and would ask that you wire us the proceeds. All collaterals are held subject to your order.

Yours very truly,

W. C. DENNEY, *Cashier.*

No. 72526, J. R. Brown.....	\$1,000.00	due Dec. 21.
33, Ouachita Valley bank.....	10,000.00	" " 24.
539, Dickenson Hdw. Co.....	1,500.00	" " 27.
413, Press P't'g Co.....	2,500.00	due Jan. 2.
441, H. P. Johnson.....	4,813.05	due Jan. 4.
7, Press P't'g Co.....	1,000.00	due Jan. 8.
489, J. E. Oliver.....	1,600.00	due Jan. 13.
566, Press P't'g Co.....	1,000.00	due Jan. 30.

\$24,413.05

## EXHIBIT 18.

(Telegram.)

Copy.

NEW YORK, Nov. 3, 1892.

First national bank, Little Rock, Ark.:

Proceeds twenty-four thousand one hundred and seventy-six dollars and sixty cents.

UNITED STATES NATIONAL BANK.

(Collect.)

## EXHIBIT 19.

Copy.

NEW YORK, Nov. 3, 1892.

W. C. Denney, Esq., cashier, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of the 31st ulto., and proceeds of same placed to your credit:

J. R. Brown, due Dec. 21.....	\$1,000.	dis.	\$8.
Ouachita Valley bk., due Dec. 24... ..	10,000.	dis.	85.
Dickenson Hdw. Co., due Dec. 27.....	2,500.	dis.	22.50
Press P't'g Co., due Jan. 2, '93.....	2,500.	dis.	25.
H. P. Johnson, due Jan. 6.....	4,813.05	dis.	51.34
Press P't'g Co., due Jan. 8... ..	1,000.	dis.	11.
J. E. Oliver, due Jan. 13....	1,600.	dis.	18.94
Press P't'g Co., due Jan. 30.....	1,000.	dis.	14.67

---

Amount of notes ..... \$24,413.05

Less discount at 6%..... 236.45

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Proceeds.. ..... \$24,176.60

Yours truly,

JNO. J. McAULIFFE,

Ass't Cashier.

33

## EXHIBIT 20.

The First National Bank of Little Rock, Ark.

Nov. 25, 1892.

United States national bank, New York city.

GENTLEMEN: Kindly advise us if you can give us \$25,000 more in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to

make further rediscounts, and we want to know what we can do in case they refuse to sell.

If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

Yours very truly,

W. C. DENNEY, *Cashier.*

#### EXHIBIT 21.

Copy.

NEW YORK, Nov. 28, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Yours of the 25th is to hand.

We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6%.

Yours very truly,

H. C. HOPKINS, *Cashier.*

#### EXHIBIT 22.

LITTLE ROCK, ARK., Dec. 13, 1892.

United States nat. bank, New York city.

GENTLEMEN: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying \$175,000 in demand loans on cotton, which we may have to carry two or three months longer.

34 We enclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

Yours very truly,

H. G. ALLIS, *President.*

Dickenson Hardware Co., due March 3.....	\$2,500 00
Dickenson Hardware Co., due April 6.....	5,000 00
City Electric St. R'y Co., due April 10....	5,000 00
City Electric St. R'y Co., due April 10.....	5,000 00
City Electric St. R'y Co., due April 10.....	5,000 00
McCarthy & Joyce Co., due May 10.....	5,000 00
McCarthy & Joyce Co., due April 10.....	5,000 00

\$32,500 00

We hold all collaterals recited, subjected to your order, and for your account.

#### EXHIBIT 23.

Copy. Registered.

NEW YORK, Dec. 16th, 1892.

H. G. Allis, Esq., pres't, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of the 13th inst. and proceeds of same placed to your credit:

Dickinson Hardware Co.	due M'ch 3, '93....	\$2,500	disc't	\$32 08
Do.	do. " Ap'l 6, '93....	5,000	"	92 50
City Electric St. R'y Co.	" 10 ....	5,000	"	95 83
"	" 10 ....	5,000	"	95 83
Do.	do. " 10 ....	5,000	"	95 83
McCarthy & Joyce Co.	" 10 ....	5,000	"	95 83
Do.	do. May 10 ....	5,000	"	120 83

Amount of notes..... \$32,500  
Less discount at 6% ..... 628 73

Proceeds,..... \$31,871 27

We enclose herewith note of Dickenson Hardware Co. \$5,000 due Ap'l 6th for insertion of amount in body and return to us.

Yours truly,

JNO. J. McAULIFFE,

*Ass't Cashier.*

35

EXHIBIT 24.

(Telegram.)

Copy.

NEW YORK, December 17, 1892.

First national bank, Little Rock, Arkansas :

Letter thirteen received notes discounted proceeds credited account.

UNITED STATES NATIONAL BANK.

(Collect.)

EXHIBIT 25.

The First National Bank of Little Rock, Ark.

DEC. 20, 1892.

United States national bank, New York city.

GENTLEMEN : We have your favor of the 16th inst., enclosing the Dickinson Hardware Company note for completion, which we herewith return.

We charge your account with \$31,871.27, proceeds of \$32,500.00 of discounts.

Yours very truly,

W. C. DENNEY, *Cashier.*

EXHIBIT 26.

Copy.

NEW YORK, Dec. 23, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR : Your favor of the 20th inst., enclosing note of the Dickinson Hardware Co. filled in as requested in ours of the 16th, duly received.

Yours very truly,

JNO. J. McAULIFFE,

*Ass't Cashier.*



## EXHIBIT 27.

(Telegram.)

LITTLE ROCK, ARK., Dec. 21, 1892.

U. S. nat'l bank, N. Y.:

Can you discount thirty thousand country banks' paper secured by cotton thirty days no renewal desire to carry over holidays answer day message.

H. G. ALLIS, *President*.

36

## EXHIBIT 28.

Copy.

NEW YORK, Dec. 21, 1892.

Mr. H. G. Allis, pres't, Little Rock, Ark.

DEAR SIR: We are in receipt of your telegram which reads as follows: "Can you discount thirty thousand country banks' paper secured by cotton—thirty days, no renewal—desire to carry over holidays—Answer day message," and we replied as follows: "Yes," which we now confirm.

Money is very close with us, and you have, no doubt, noticed that we have had practically a panic in Wall St. for several days, money loaning as high as 40 %. For this reason we beg that you will make your loan on us as light as possible, borrowing only what you are bound to have, but we will take care of you and give this loan as requested.

Yours truly,

J. H. PARKER, *President*.

## EXHIBIT 29.

The First National Bank of Little Rock, Ark.

DEC. 21, 1892.

United States national bank, New York city.

GENTLEMEN: I enclose herein for discount and credit \$25,000 of the Bank of Batesville paper, secured by cotton and insurance, and \$5,000 of the People's Exchange Bank of Russellville.

Kindly send us statement of proceeds. This will carry us over the holidays, after which time our cotton will be disposed of, and our collections from our country banks paid.

Collaterals to these notes are held by us in trust for you.

Yours very truly,

W. C. DENNEY, *Cashier*.

## EXHIBIT 30.

Copy.

NEW YORK, *Dec. 27th*, 1892.

W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of 21st inst. and proceeds of same placed to your credit:

37	People's Exc. Bk. Russellville, due		
	Jan. 18, '93.....	\$5,000.	disc't \$18.33
	Bank of Batesville, due Jan. 18, '93.....	10,000.	" 41.67
	Do. " " " .....	10,000.	" 41.67
	Do. " " " .....	5,000.	" 20.83

Amount of notes.....	\$30,000.
Less discount at 6 %.....	122.50

Proceeds.....	\$29,877.50
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Yours truly,

JNO. J. McAULIFFE,  
*Ass't Cashier.*

## EXHIBIT 31.

Copy.

NEW YORK, *July 12th*, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Can you give us an active account? We should like to make our relations as close as possible and should appreciate it if you would give us your active business. Kindly let me hear from you in reference to it.

Yours very truly,

H. C. HOPKINS, *Cashier.*

## EXHIBIT 32.

Copy.

NEW YORK, *July 15*, 1892.

W. C. Denney, Esq., cashier, Little Rock, Ark.

DEAR SIR: We return herewith 60 days' sight draft on London for £953, 19 9 for written indorsement, received from you in your favor of July 12th we could give you \$4.86 on this, which is the best the market affords.

Yours very truly,

J. W. HARRIMAN,  
*2d Ass't Cashier.*

## EXHIBIT 33.

Copy.

NEW YORK, *July 28, 1892.*

S. B. Smith, ass't cash., Little Rock, Ark.

DEAR SIR: As per yours of July 25th and our advice of July 15th in reference to exchange, we have this day credited you with the entire  $\frac{1}{2}\%$ , giving you \$4.86 on the £35<sup>2</sup> 19 9 received in yours of July 18th, instead of \$4.85 $\frac{1}{2}$ .

Yours very truly,

J. W. HARRIMAN,  
2d Ass't Cashier.

38

## EXHIBIT 34.

Copy.

LITTLE ROCK, ARK., — 8.

United States nat'l bank, New York:

Charge our account deposit with Southern nat'l bank for our credit twenty thousand dollars.

FIRST NAT'L BANK.  
W. C. DENNEY, *Cashier.*

## EXHIBIT 35.

LITTLE ROCK, ARK., *Aug. 8.*

United States nat'l bank, New York:

We confirm telegram to deposit twenty thousand with Southern nat'l for our credit.

W. C. DENNEY, *Cashier.*

## EXHIBIT 36.

LITTLE ROCK, ARK., *Aug. 8, 1892.*

United States national bank, New York city.

GENTLEMEN: We wired you today to charge our account and deposit with the Southern National Bank of New York for our credit, \$20,000.00, which we herewith confirm.

I have your favor of the 4th inst., relative to two collections of \$1,500.00 each on J. H. Hamlen & Son, of Portland, Me., and in reply will say that we would like to have all drafts on this company sent to the First National Bank of Portland, Me., for collection, as Mr. Hamlen is director in that bank, and requests us to handle them in this way.

If you can arrange to make the collection through them, we would like to have it done.

Yours very truly,

W. C. DENNEY, *Cashier.*

## EXHIBIT 37.

Copy.

NEW YORK, *August 11, 1892.*

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: The deposit with the Southern national bank for your account was promptly made.

We note what you say about sending drafts on Hamlen to the First National Bank of Portland. We should be glad to  
39 comply with any of your requests, but our correspondent there is the Portland national bank, and I do not see how we could, under these circumstances, send the drafts to the First national. Trusting that you will appreciate the difficulties standing in the way of our sending them in the way you request, I am,  
Yours very truly, H. C. HOPKINS, *Cashier.*

## EXHIBIT 38.

LITTLE ROCK, ARK., *Oct. 3, 1892.*

Mr. H. C. Hopkins, cashier, United States national bank, New York city.

DEAR SIR: Referring to the enclosed notice of overdraft, have to say that on September 29th our books showed a credit balance with you of \$23,177.95. We have never overdrawn our account with you.

Our books show that we have with you today \$9,143.22.

We have remittances coming to you from Michigan, amounting to about \$8,000.

Kindly investigate our account, and advise us who is to blame for this error.

Mr. Allis, our president, is in the East on business and will call upon you some time this week.

We trust to hear from you promptly in regard to this overdraft, as we cannot understand how it happened.

Yours very truly,

W. C. DENNEY, *Cashier.*

## EXHIBIT 39.

LITTLE ROCK, ARK., *Oct. 4, 1892.*

United States nat'l bank, N. Y.:

Sept. statement received and understood, we remit you today pay all checks answer.

FIRST NAT'L BANK.

## EXHIBIT 40.

LITTLE ROCK, ARK., *10, 3, 1892.*

United States nat'l bank, N. York:

Our books show balance with you ten thousand and eight thousand in transit send statement to date at once.

FIRST NAT'L BANK.

40

## EXHIBIT 41.

LITTLE ROCK, ARK., 10, 7, 1892.

United States nat'l bank, New York:

There is something wrong with mail. We are not overdrawn should have ten thousand balance with you sent you ten thousand today and will wire you fifteen more from St. Louis tomorrow. Our check on First nat. bank should be good. There is some mail miscarried.

FIRST NAT. BANK.

## EXHIBIT 42.

LITTLE ROCK, ARK., Oct. 8, 1892.

United States nat. bank, N. Y.:

National Bank of Commerce St. Louis will deposit today fifteen thousand. We have credit balance without it now we are sure to be right answer when received have you received eight thousand from Jackson, Mich. We sent you ten thousand by mail yesterday.

FIRST NAT'L BANK.

## EXHIBIT 43.

Copy.

NEW YORK, Oct. 7th, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: We have been obliged to advise you for several days past of your account being overdrawn. We cannot continue to send you even your own paper which we have discounted for you for collection unless you keep balances with us to warrant our doing so. You should have balances with us to keep this paper covered, at least.

Will you not let us hear from you in reference to this matter?

Yours very truly,

J. W. HARRIMAN,

2d Ass't Cashier.

## EXHIBIT 44.

LITTLE ROCK, ARK., Oct. 8, 1892.

United States national bank, New York city.

GENTLEMEN: Replying to your many telegrams in regard to what we have done and what we shall do, we have to say that this whole matter began with a mistake by our book-keeper. In crossing the page on his balance book, the lines were misruled and he got every account on that page on the wrong line, and on the 29th when you notified us of being in overdraft, we supposed that we had with you \$23,000.

Since that we have sent you a remittance of \$15,000 say in round numbers, from Port Huron, \$10,000 in last night's mail, and \$15,000

by wire today from St. Louis. You should have had some few days ago a remittance of about \$8,000 from Jackson, Mich., which would have made \$48,000 sent you since the 29th of September. Our books show a balance with you today of \$15,000.

We have to say, in regard to the check of \$8,000 on the First national bank, which was unpaid, that that account has been good since we discovered this error, and we have been informed that the check has since been paid.

We would like to say that this bank has been in existence for twenty-five years, that we are responsible and do not make statements which we do not believe to be true.

As for keeping a balance with you, which you seem to think ought to be large to justify accommodations, which you are giving us, have to say that you ought to know that southern banks cannot keep large eastern balances during the cotton season. We need our money close to home, so that we can easily obtain currency for the payment of cotton.

For eight months in the year we carry balances in New York which justify us in having a line of credit \$100,000 larger than you have given us this year. We promised to give you our account, and we propose to do so, as soon as it can be conveniently brought about.

We trust that our books agree on balances, and will say that in future when we want an overdraft for one or two days, we will first obtain your permission by telegraph.

Trusting that this explanation is satisfactory, and requesting that you give us a prompt advice when the Jackson, Mich., deposit is received, and that our business relations from now on may be pleasanter than within the past few days, I am,

Yours very truly,

W. C. DENNEY, *Cashier.*

42

EXHIBIT 45.

Copy.

NEW YORK, (Oct.) 11th, 1892.

Mr. W. C. Denny, cashier, Little Rock, Ark.

DEAR SIR: Yours of the 8th, replying to our telegram concerning your overdraft, duly received. We note what you say in regard to the error on the part of your book-keeper. Your account now stands on the credit side.

As we have before advised you, the \$8,000 check on the First national bank which was refused on first presentation, was afterwards paid.

We note what you say in reference to giving us your account, and assure you that we shall welcome this increased relation.

We are aware of how close money must run with the southern banks during the cotton season, but, at the same time, we considered that you should at least have had funds with us to cover your paper maturing with us. We dislike overdrafts in any shape, and would prefer to have you send on your good, well-rated paper and have us

place it to your credit. We will promptly advise you upon receipt of remittance from Jackson, Mich., as you request.

Yours very truly,

H. C. HOPKINS, *Cashier.*

EXHIBIT 46.

LITTLE ROCK, ARK., Oct. 10, 1892.

U. S. nat. bank, N. Y.:

Our books show balance twenty thousand is that correct?

FIRST NAT'L BANK.

EXHIBIT 47.

Copy.

NEW YORK, Oct. 17, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Your telegram received. At the time we sent the paper forward for collection your account with this bank was overdrawn to a considerable extent, and you also had other paper in your hands not yet matured. As your balances at that time did not warrant our sending you an increased line, we forwarded the paper for collection to another correspondent.

Now that you have good balances with us, it is our intention to send you collections as usual, and we trust that it will not  
43 be necessary for us to send collections upon Little Rock and other points in Arkansas, upon which you have usually collected for us, to any other bank.

Yours very truly,

J. W. HARRIMAN,

2d Asst Cashier.

EXHIBIT 48.

Copy.

NEW YORK, Oct. 27, 1892.

Mr. W. C. Denney, cashier, First nat'l bank, Little Rock, Ark.

DEAR SIR: Your account is today overdrawn over \$2,200. Please see that you have sufficient funds with us to meet maturing bills discounted.

Yours very truly,

H. C. HOPKINS, *Cashier.*

EXHIBIT 49.

LITTLE ROCK, ARK., Oct. 29, 1892.

Mr. H. C. Hopkins, cashier, New York city.

DEAR SIR: I have your overdraft notice of the 26th, and wired you today that our balance should be about \$33,000.

We sent you on the 17th a cash item on Boston with bill of lading attached, for \$1,233.87; also one on the 20th for \$1,935.11, and on the 22nd one for 14,420.19, which you do not appear to have redited on receipt.

We were advised on the 17th that \$5,000 had been sent you from Saginaw, Mich., and on the 26th \$19,733.07 had also been sent you from Saginaw, and on the 27th \$9,030.84 had been sent you from Manistee, Mich. We have not had any credit notice from you on these matters, but they certainly must be in your hands by this time. These items should give us a balance of \$33,227.82 today.

I would like to ask again in regard to the manner in which you propose to handle our cotton drafts, with bills of lading attached. It was our understanding that these items were to be taken on receipt at par. If you have changed your mind as to the way of handling them, please advise us.

I would also say that we do not overdraw our account, and if it should appear so on your books, you may be positively certain that there is something in transit to cover the account. Whenever we want to overdraw, we will ask for it by wire, and we will never want it for more than one or two days; but since we have  
44 had an account with you we have not in any instance overdrawn our account. We trust that you have received these items by this time and that the account is as we state it.

Yours very truly,

W. C. DENNEY, *Cashier.*

EXHIBIT 50.

Copy.

NEW YORK, Nov. 1, 1892.

W. C. Denney, Esq., cashier, Little Rock, Ark.

DEAR SIR: Yours of Oct. 29th, in reply to our notice of overdraft, duly received. The remittances which you state should have reached us have since been received and credited to your account, and your account now stands on the right side.

In relation to handling cotton drafts with bills of lading attached, would state that all "sight" drafts upon the east carry grace, which would necessitate a deduction for the time between the receipt and the maturity of the drafts. This is our custom with all our southern correspondents who forward us such drafts. If you will have these drafts drawn "on demand," we will then pass them to your credit on receipt free of charge, but, as explained above, all "sight" items carry three days grace, and are, therefore time items. Should you prefer to have us pass these time items directly to your credit, less one-tenth of 1 %, we shall be glad to comply with your wishes; otherwise, we will enter for collection and credit when paid.

Kindly let us know what your wishes are in the matter.

Yours very truly,

J. W. HARRIMAN,

2d Ass't Cashier.

EXHIBIT 51.

LITTLE ROCK, ARK., Nov. 7, 1892.

Mr. Joseph W. Harriman, second ass't cashier, New York city.

DEAR SIR: Replying to your favor of the 1st inst., in regard to the handling of cotton drafts, have to say that the New York banks



do not seem to agree on the handling of sight drafts. Our other correspondent there takes all cotton paper, whether sight or demand, for credit on receipt at par. Of course if there is a net loss to you in crediting up the sight items on receipt, we will not send them to you. We do not expect any one to favor us at a loss.

Yours very truly,

W. C. DENNEY, *Cashier*.

45

## EXHIBIT 52.

Copy.

NEW YORK, Nov. 11, 1892.

W. C. Denney, Esq., cashier, Little Rock, Ark.

DEAR SIR: Yours of Nov. 7th, in reference to cotton drafts, received. As you are doubtless aware sight drafts on New England carry grace. Will you please advise us of the amount you would be likely to send us of such items drawn at sight. If you could have these drafts drawn on demand there would be no trouble at all in any way, and we would take them from you without charge.

Please let us hear from you further in reference to this matter.

Yours very truly,

J. W. HARRIMAN,

*2d Ass't Cashier*.

## EXHIBIT 53.

Copy.

NEW YORK, Nov. 25, 1892.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: We have your favor of the 21st inst. enclosing par list, and we thank you for same.

We appreciate your desire to do the best you can for us, and give us your best possible terms on our collections.

Yours very truly,

H. C. HOPKINS, *Cashier*.

## EXHIBIT 54.

Copy.

NEW YORK, Jan. 7th, 1893.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: We note of late that your account has been frequently overdrawn by collection of your bills discounted maturing, and by straight checks. This is not as it should be. We have been in receipt of instructions from you to pay the ass't treasurer several amounts for your account, but your account has not warranted our doing so, not having balance on hand to meet such requests. Will you please look into this matter and give us good balances.

Yours very truly,

J. W. HARRIMAN,

*2d Ass't Cashier*.

46

## EXHIBIT 55.

LITTLE ROCK, ARK., 1, 9, 1893.

U. S. nat'l bank, N. Y.:

We transfer by wire from St. Louis tomorrow morning.

FIRST NAT'L BANK.

## EXHIBIT 56.

Copy.

NEW YORK, Jan. 9th, 1893.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Your telegram in response to our wire referring to your overdrafts, received. I can't understand why you state "you will transfer funds to cover from St. Louis tomorrow."

In the first place you should not keep all of your funds with your St. Louis correspondent, at any rate you should keep enough to keep your account covered in New York, with us.

Will you not look into this matter and advise us.

Yours very truly,

J. W. HARRIMAN,

2d Ass't Cashier.

## EXHIBIT 57.

LITTLE ROCK, ARK., Jan. 11, 1893.

United States national bank, New York city.

GENTLEMEN: The annual meeting of the directors of this bank was held at the president's office on January 10th.

The resignation of Mr. H. G. Allis as president was accepted by the new directors, and Mr. N. Kupferle was elected to that position. Below please find the signatures of the signing officers of this bank.

Very truly,

W. C. DENNEY, *Cashier*.

## EXHIBIT 58.

Copy.

NEW YORK, Jan. 16th, 1893.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Yours of the 11th inst. notifying us of the election of Mr. Kupferle as president of your bank in place of Mr. Allis, received. We have noted the change and will recognize Mr.

47 Kupferle's signature with your own and Mr. Smith's in payment of drafts against your account.

Yours very truly,

J. W. HARRIMAN,

2d Ass't Cashier.

## EXHIBIT 59.

Copy.

New York, Jan. 24th, 1893.

Mr. Logan H. Roots, president First national bank, Little Rock, Ark.

DEAR SIR: In view of the reports which we have seen in the papers regarding the assignment of the McCarthy & Joyce Co. and of the Press Printing Co., I write to ask what the condition of these companies is, and whether or not their notes will be promptly met at maturity. At the same time, I give you a list of the paper which we have rediscounted for your bank.

We are very glad to get your telegram today, advising us that the attachment on your funds would soon be removed.

We today were able to collect some of your remittance checks and from the proceeds have paid the checks presented today, and have deposited \$4,000 with the assistant treasurer for your credit.

Yours very truly,

H. C. HOPKINS, *Cashier.*

Press Print'g Co. & Geo. R. Brown, due Jan. 30 .....	\$1,000
Dickinson Hardware Co., due M'ch 3 .....	2,500
Dickinson Hardware Co., due April 6. ....	5,000
City Electric St. R'y Co., due April 10.....	5,000
City Electric St. R'y Co., due April 10.....	5,000
City Electric St. R'y Co., due April 10.....	5,000
McCarthy & Joyce Co., due April 10 .....	5,000
McCarthy & Joyce Co., due May 10 .....	5,000

## EXHIBIT 60.

LITTLE ROCK, ARK., Jan. 26, 1893.

United States national bank, New York city.

GENTLEMEN: Kindly send us memorandum statement of discounts you have made for us since July 1st, 1892, giving name, due date, amount, and the time the discount was made.

Yours very truly,

S. B. SMITH,

*Ass't Cashier.*

48

## EXHIBIT 61.

Copy.

New York, Jan. 30, 1893.

S. B. Smith, Esq., cashier, Little Rock, Ark.

DEAR SIR: As requested in yours of the 26th inst., we herewith enclose memo. of items discounted for account of the First National Bank of Little Rock, Ark., from July 1st, 1892, to January 30th, 1893.

Yours truly,

JNO. J. MCAULIFFE,

*Ass't Cashier.*

EXHIBIT 62.

LITTLE ROCK, ARK., Jan. 27, 1893.

United States national bank, New York city.

GENTLEMEN: Below please find the duly authorized signatures of the officers of this bank.

Yours very truly,

W. C. DENNEY, *Cashier.*

EXHIBIT 63.

Copy.

NEW YORK, Feb. 1st, 1893.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Yours of the 27th is to hand, enclosing signatures of your officers, and same have been placed on file, and will be duly recognized in payment of drafts, etc.

Yours very truly,

J. W. HARRIMAN,  
*2nd Ass't Cashier.*

EXHIBIT 64.

Copy.

NEW YORK, Feb. 3, 1893.

First national bank, Little Rock, Ark.

GENTLEMEN: We are today in receipt of a number of cancelled items amounting to \$9,698.36, upon this bank. Kindly advise us your wishes in regard to same. We hold them here.

Yours very truly,

J. W. HARRIMAN,  
*2nd Ass't Cashier.*

49

EXHIBIT 65.

Copy.

NEW YORK, Jan. 30, 1893.

Mr. W. C. Denney, cashier, Little Rock, Ark.

DEAR SIR: Yours of the 27th is to hand. The attachment has not yet been vacated, and we wired you to that effect today. We are very anxious that you have this attachment removed, and let us go on doing business with you.

We are glad indeed to hear that your deposits are increasing and that you are over your trouble. I congratulate you on getting Mr. Roots to take charge of the bank with you, and wish you every success.

Yours truly,

J. H. PARKER, *President.*

## EXHIBIT 66.

Copy.

TREASURY DEPARTMENT,  
OFFICE OF THE COMPTROLLER OF THE CURRENCY,  
LITTLE ROCK, 1, 21, 1893.

U. S. nat'l bank.

DEAR SIR: Kindly mail me a list of notes held by you and re-discounted by the First Nat. Bank Little Rock, Ark., also render statement showing balance of the above-named bank from January 1st up to and including January 19th, also give amount of balance at close of business on day of receipt of this letter.

Very truly,

G. W. GALBRAITH, *Examiner*.

## EXHIBIT 67.

Copy.

JANUARY 26, 1893.

G. W. Galbraith, Esq., examiner, Little Rock, Ark.

DEAR SIR: As you requested in yours of 21st ult., please find below list of notes discounted for the account of the First National Bank of Little Rock, Arkansas, and now held by this bank.

Note of Press Printing Co. <i>et al.</i> , due Jan. 30, 1893.....	\$1,000
Note of Dickinson Hdw. Co., due M'ch 3, 1893... ..	2,500
Note of Dickinson Hdw. Co., due April 6, 1893.....	5,000
Note of City Electric St. R'y Co., due April 10, 1893.....	5,000
Note of City Electric St. R'y Co., due April 10, 1893.....	5,000
Note of City Electric St. R'y Co., due April 10, 1893.....	5,000
Note of McCarthy & Joyce Co., due April 10, 1893.....	5,000
Note of McCarthy & Joyce Co., due May 10, 1893.....	5,000

50 If it would serve you in any way we will send you a list of all notes discounted by us for the First national bank, Little Rock, Ark., also; please find statement of account current as requested.

Yours truly,

J. J. MCAULIFFE,  
*Ass't Cashier*.

## EXHIBIT 68.

Copy.

Office of Logan H. Roots, receiver the First National Bank of  
Little Rock, Ark.

MAR. 9, 1893.

United States national bank, New York city.

GENTLEMEN: In a memorandum of discounts furnished by you to this bank, which I find here, there are the following-mentioned items which do not appear in any way upon the books of this bank:

George R. Brown, H. G. Allis .....	\$5,000.00
George R. Brown, H. G. Allis .....	5,000.00
George R. Brown, H. G. Allis ... ..	5,000.00
George R. Brown, H. G. Allis .....	5,000.00
James Joyce, H. G. Allis.....	5,000.00
James Joyce, H. G. Allis.....	5,000.00

I am endeavoring to get at the facts of all these matters as rapidly as possible, and shall be pleased to have you forward me all the information you can, including full copies of the correspondence upon which these discounts were made.

Very respectfully,

LOGAN H. ROOTS, *Receiver*.

\* \* \* \* \*

#### EXHIBIT 70.

Copy.

Office of Logan H. Roots, receiver the First National Bank of Little Rock, Ark.

MAR. 28, 1893.

United States national bank, New York city.

GENTLEMEN: We find in our files a letter from you of December 16th reciting the discount of certain notes, forwarded from here under date of the 13th. We cannot find any copy of the letter, sending the notes of discount.

51 There are reasons why we would like an authenticated copy of the letter forwarding the papers, and as full a description of the papers as practical.

If not too much trouble, we would like a copy of each note, and its endorsements, especially of the Electric Street Railway Company and the McCarthy & Joyce Company, which you now have in hand.

Your prompt and early attention will be appreciated.

LOGAN H. ROOTS, *Receiver*.

#### EXHIBIT 71.

Copy.

MARCH 31ST, 1893.

Mr. Logan H. Roots, receiver First national bank, Little Rock, Ark.

DEAR SIR: Yours of the 28th is to hand. I enclose you sworn copy of the letter from Mr. H. G. Allis, president, under date of December 13th, 1892. We have already sent forward for collection all the notes in question, except the McCarthy & Joyce note due May 10th, of which we send you an exact copy. We have taken the particulars of the other six notes from our discount book, as far as we have them recorded, which we enclose you herewith.

Yours very truly,

(S.)

H. C. HOPKINS, *Cashier*.

P. S.—Will you kindly inform us how the affairs of the First national bank stand, and what the prospects are of its paying its liabilities in full? Thanking you in advance I am

Yours very truly,  
(S.)

H. C. HOPKINS, *Cashier.*

EXHIBIT 72.

Copy.

Office of Logan H. Roots, receiver United States national bank.

LITTLE ROCK, ARK., *Apr'l 13, 1893.*

United States national bank, New York city.

GENTLEMEN: In order that we may keep in hand information concerning the paper upon which this bank is indorser, please advise us as to what paper has been paid which has been discounted by you for this bank.

Very respectfully,

LOGAN H. ROOTS, *Receiver.*

52

EXHIBIT 73.

Copy.

APRIL 18TH, 1893.

Logan H. Roots, Esq., receiver 1st nat. bank, Little Rock, Ark.

DEAR SIR: In compliance with your request of the 13th inst, I beg to enclose a memo. of notes discounted by this bank for the account of the First nat'l bank, Little Rock, Ark., setting forth the items paid, unpaid, and to mature.

Trusting that this will meet your wishes, and should you desire any further information, you have only to command.

Yours truly,

(S.)

J. J. McAULIFFE,  
*Ass't Cashier.*

EXHIBIT 74.

Copy telegrams.

LITTLE ROCK, ARK., *Jan. 9th, 189-*

To Dr. J. H. Parker, New York:

First national in trouble. Bank examiner here. Can't tell until he reports condition.

JOHN G. FLETCHER.

ST. LOUIS, MO., *Jan'y 17th, 1893.*

J. H. Parker, pres't U. S. nat'l bank, N. Y.:

I am told there is some talk in Little Rock about a bank there.

C. W. BULLEN.

LITTLE ROCK, ARK., *Jan'y 18th, 1893.*

United States nat. bank, New York:

We have no knowledge of any such transaction.

FIRST NAT'L BANK.



LITTLE ROCK, ARK., *Jan'y 19th*, 1893.

U. S. nat'l bank, New York :

In reply to yours of 18th will say the bank never held the Joyce notes and they do not appear on our books. Thanks for kind offer ; we do not need assistance at present.

FIRST NAT'L BANK.

53

EXHIBIT 75.

Copy telegrams.

LITTLE ROCK, ARK., *Jan'y 19*, 1893.

To U. S. nat'l bank, New York :

Our books show December sixteenth seven thousand five hundred of Dickinson Hardware Company and no more.

FIRST NATIONAL BANK.

St. LOUIS, Mo., *Jan'y 20*, 1893.

J. H. Parker, pres., New York :

Have private letter from Little Rock giving opinion that foreign creditors will have to look to their collaterals.

C. W. BULLEN.

St. LOUIS, Mo., *Jan'y 20*, 189-.

J. H. Parker, pres't, New York :

Press Printing Company and the McCarthy & Joyce Co. assigned preferring First national bank Little Rock City Electric R'y heavily bonded other collaterals appear to be good. Local banks are loaning on banks best collaterals so that depositors are being paid off. Mr. Bullen out of city.

JNO. CARO RUSSELL, *Cashier*.

EXHIBIT 76.

Copy telegrams.

JAN'Y 20, 1893.

(Over Hubbard Price & Co.'s private wire.)

First national in trouble but not yet failed. They had a little run on them three days ago but other banks assisted them enough to pay and bank still open. The officers and people near them seem to owe bank large amounts. Understand the president alone owes the bank about two hundred thousand and others—bank examiner is here and my opinion is that the end is not yet.

JAN. 24, 1893.

(Over Hubbard Price & Co.'s private wire.)

Col. Logan H. Roots the former president has been elected to that position again and the First national bank is all right. A sixty per cent. assessment has been decided on and with Mr. Roots as president and Dr. Taylor as vice-president confidence is at once restored.

54

(S.)

PICKETT.

FEB'Y 10, 1893.

H. G. Allis was arrested about twenty minutes ago.

(Hubbard Price & Co.'s private wire.)

LITTLE ROCK, ARK., May 10, 1893.

H. C. Hopkins, cashier, New York :

Payment refused note McCarthy & Joyce Co. five thousand due today. Sent us through Pine Bluff.

M. H. JOHNSON, *Cashier.*

All the letters from Allis and Denney to the United States national bank and attached as exhibits to said deposition are written on the letter-heads of the First National Bank of Little Rock.

EXHIBIT "77."

The account current here referred to began June 27th, 1892, and continued until the suspension of business of the First national bank. It shows almost daily entries of debit and credit. It shows that the several notes discounted by the U. S. national bank and referred to in the depositions of the officers of that bank, being 49 in number, were charged against the account of the First national bank by the U. S. national bank at the several dates of their maturity. In  $\frac{2}{3}$  of the instances where such charges were made the balance to the credit of the First national bank on the books of the U. S. national bank was sufficient to cover the charge. In other instances the balance to the credit of the First national bank was insufficient to meet the charge at the time of the entry, and in the other instances the account of the First national bank was in overdraft as shown by the books of the U. S. national bank at the time the charge was made.

The account shows that at the time of the suspension of the First national bank the latter bank had a credit of 467.86 upon the books of the U. S. national bank. Against this balance the notes in suit with protest fees were charged on the account April 17th  
55 and May 15th, 1893, making the account show a balance in favor of the U. S. national bank of \$24,558.03.

This is the paper marked "77" referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman, and John J. McAuliffe, hereto annexed.

H'Y H. WHITMAN,  
*Notary Public.*

H. C. HOPKINS.  
J. H. PARKER.  
J. W. HARRIMAN.  
J. J. MCAULIFFE.

J. H. Parker, president; Joseph W. Harriman, 2nd assistant cashier, and John J. McAuliffe, assistant cashier, each testified to identically the same facts in the identical language as Henry C. Hopkins, and it is agreed that the depositions of Hopkins shall be treated as the deposition of each of the said witnesses without the necessity of copying the deposition of each witness.

56 M. H. JOHNSON, a witness for plaintiff, testified as follows :

Q. Where do you live ?

A. Little Rock.

Q. What is your business ?

A. Cashier Bank of Little Rock.

Q. How long have you been cashier of that bank ?

A. Six years.

Q. Did that bank hold at any time five notes which I show you—the notes in controversy in this case—for collection, or presentment or protest, three of City Electric Street Railway Company and two of McCarthy & Joyce ?

A. Yes, sir ; they did. They held them for collection.

Q. Have you the letters transmitting the notes to you ?

A. Yes, sir.

Counsel for plaintiff here reads letter to the jury as follows :

" PINE BLUFF, ARK., 4, 15, '93.

Bank of Little Rock.

DEAR SIRs: Enclosed please find as stated below for collection and credit.

Very respectfully,

W. D. HEARNE, *Cashier*.

City Electric Street Railway Company.....	\$5,000	Protest.
" .....	5,000	"
" .....	5,000	"
McCarthy & Joyce Company.....	5,000	" "

57 Q. Was that by your bank that note " Protest ? "

A. No, sir ; that was by the sender, and that is an instruction to protest. Each one has opposite " Protest."

" PINE BLUFF, ARK., May 1, '93.

Bank of Little Rock.

DEAR SIRs: Enclosed please find as stated below for collection and credit.

Very respectfully,

W. D. HEARNE, *Cashier*.

No. 34689 Sam. Churchill.....	\$28.35	No protest.
No. 34673 McCarthy & Joyce.....	5,000.00	Protest.
No. 6946 E. H. Hudson & —.....	40.00	Protest.

Wire United States National Bank New York if this note is not paid."

Q. These are the letters transmitting the paper to you for collection or protest ?

A. Yes, sir.

(—.) Did you cause them to be protested ?

A. I did ; yes, sir.

Q. How long have you been in the banking business ?

A. About fifteen years.

Q. How long have you been in the banking business at Little Rock?

A. About six years.

Q. State whether or not the banks at Little Rock have been in the habit of rediscounting paper since you have been here?

A. The banks have been in the habit of rediscounting.

Q. To what extent have they been in the habit of rediscounting?

A. Well I could only say as to my own bank.

Q. Well, in what season of the year do you rediscount paper?

A. Generally in the latter part of the summer, commencing with August.

Q. Well, has it been the custom of your bank to rediscount considerable during that season?

A. Some years we have; other years we have been very light in discounting.

Q. Now I will ask you, from your knowledge and association of other banks here, don't you know that other banks have done the same thing, rediscounted?

A. Yes, sir; I know they have.

Q. I will ask you if it is necessary during certain seasons of the year for them to rediscount, and state why it is?

A. Well, their capital is not sufficient to meet all the needs of the borrowers, and they sell paper, call it rediscounting.

58 Q. What do you mean by rediscounting?

A. Well, they sell it to banks in the East at a nominal rate of interest.

Q. You would send to the banks in the East and they would rediscount it at a nominal rate of interest?

A. Yes, sir.

Q. What now was the custom or the method of rediscounting? Who would attend to the rediscounting of paper generally for the banks? State, Mr. Johnson, what you know about the manner of rediscounting, who generally attended to it.

A. The president and cashier had authority to do the rediscounting.

Q. How did they do it as a rule? Did the president and cashier do it?

A. The president and cashier did it.

Q. Were they required to get an order or authority from the board of directors to do so?

A. No, sir.

Q. Do you know anything about the manner in which the First national bank conducted its business in that respect?

A. No, sir.

Q. Do you know anything about the custom of the other banks?

A. No, sir.

Cross-examination:

Q. Is your bank a national bank?

A. No, sir.

Q. Was it the custom in your bank for the president to take

these matters in his own hands and to do as he pleased about borrowing money?

A. Well, the president and cashier always sent off notes for rediscount when the bank needed it.

Q. Who did that? The president or cashier?

A. The two officers in conjunction.

Q. The cashier commonly conferred with the president and then transacted the business?

A. Yes, sir.

Q. The cashier is ordinarily recognized as the official organ of the bank, is he not?

A. Yes, sir.

Q. You state that in the latter part of the summer, that banks here, when they are in the habit of discounting, that was the time, I believe, was it not?

A. Usually, yes sir.

Q. At other times it was unusual?

59 A. Yes, sir, it was not very often that rediscounting was done at other seasons.

Q. Now, in raising money in that way, it was usual with the banks also sometimes to execute a note themselves directly for the loan that was made, wasn't it?

A. Yes, sir; that was sometimes done.

Q. That was considered just as legitimate among your bank officers as rediscounting, and considered as about the same thing, was it not?

A. Yes, sir.

Q. They would also sometimes, would they not, issue a certificate of deposit and take money from other banks and make a loan in that form, would they not?

A. Yes, sir.

Q. They considered that in about the same light as what you called rediscount?

A. Yes, sir.

Q. It was all done for the same purpose?

A. Yes, sir.

Q. And the same authority was possessed by the different officers for doing one thing as for doing the other?

A. Yes, sir.

Redirect:

Q. Mr. Johnson, which was the most common method, to rediscount, or to give a note by the bank direct?

A. Rediscount.

Q. Well, I will ask you if it was not a rare thing for a bank to give a note direct?

A. It was for our bank, I do not know about other banks.

Q. Judge Cockrill asked you about the difference between the rediscounting and giving a note direct. What is the difference between?

A. Well, rediscounting, the paper is absolutely sold, sold out-

right to the bank with whom we were discounting. Where we execute a note, we just simply execute our obligation to that bank to pay them so much money at a fixed time.

Q. Now, you had frequent dealings with the First national bank during the time Mr. Allis was there, did you not? And you knew of its dealings?

A. Yes, sir, we knew something of it, of course.

Q. State to the jury, if you know, who was the man in authority there at that bank.

A. I do not think I could answer that specifically. I had no dealings that would let me know who was in authority.

60 C. T. WALKER, a witness for plaintiff, testified as follows:

Q. Where do you live?

A. Am living here at present.

Q. Were you cashier of the First national bank during the time Mr. Allis was president of the bank?

A. About 11 months.

Q. What time was that?

A. From November, 1890, to October, 1891.

Q. Mr. Allis was president at that time?

A. Yes, sir.

Q. What was the custom of that bank at that time as to rediscounts?

A. Well, these matters were usually referred to the president of the bank. He directed me.

Q. Who referred them to him?

A. The cashier or assistant cashier. Usually the assistant cashier as that went into the current correspondence of the bank and he attended to that.

Q. Then whenever you needed rediscounts, you would refer that to the president?

A. Yes, sir.

Q. State now what he would do.

A. He generally directed what amount and where to send them.

Q. Then I understand he had control of the rediscounts?

A. Yes, sir, they were usually referred to him.

Q. Were these matters ever referred to the board of directors?

A. I cannot say whether he referred them to the board or not.

Q. You do not know?

A. No, sir.

Q. You were usually at every meeting of the board of directors, were you not?

A. Not at the discount meeting; very rarely I was present when they sat. I was there at the regular monthly meetings of the board.

Cross-examination:

Q. These matters were referred back to the cashier in the end for the purpose of procuring the discounts? When discounts were de-

terminated upon, the cashier was the man who transacted the business, was he not?

A. Well, most of that was done with Mr. Denney, the assistant cashier. I do not remember ever sending off a batch of them.

61 Q. They were not done by the president?

A. Well, before they were made at all.

Q. Merely asked his advice in regard to it?

A. Yes, sir, generally asked his instructions.

Q. And the cashier attended to the business?

A. Yes, sir, or the assistant cashier.

Q. You attended to much of that business yourself, did you not, in addition to what was done by the assistant cashier?

A. Not a great deal of it, because that usually went through the current correspondence of the bank, and Mr. Denney conducted all that.

Q. Mr. Denney was the assistant cashier?

A. Yes, sir. I do not think I ever sent off but one lot of rediscounts. I may have sent more, but I do not recollect of but one.

Q. The duties of your office required your attention elsewhere, and they provided Mr. Denney as the assistant cashier for the purpose of conducting it for the cashier?

A. He carried on the current correspondence usually—collections and everything of that kind generally went through his desk.

Q. Do you know anything about what took place in that bank after you left it?

A. No, sir; not at all.

Q. You do not know whether even the same course of dealing that was prevalent when you were there, continued?

A. Do not.

Q. Do not know whether the president was even consulted by the cashier and assistant cashier after that as to what should be done in regard to discounts?

A. Do not.

Q. Now, what time do you say it was that your connection with the First national bank ceased?

A. It was about between the 1st and 15th of October, 1891.

Q. You do not know what the course of business in the year 1892 was at all?

A. No, sir.

Redirect:

Q. You do not know whether the assistant cashier did all the re-discounting or all the correspondence or not, do you?

A. When?

Q. In reference to rediscounting while you were in the bank?

A. I cannot say he did all. It may be possible that I sent off once or twice, but usually it went through his hands.

62 Q. Did he do it all? Did the president ever do anything of that kind?

A. Not that I remember of.

Q. He did have the authority to direct the amount to be sent and



where to be sent, and the cashier or assistant cashier acted under his directions?

A. Yes, sir. Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send it to.

Cross-examination:

Q. The First national bank had different correspondents in other States?

A. Yes, sir.

Q. And when rediscounts were to be made somebody had to determine to which one of these banks the notes would be sent for the purpose of rediscounting, and that is the duty that the president did?

A. Mr. Allis usually directed that.

Plaintiff introduces in evidence the reports or statements by the bank to the Comptroller of the Currency, showing the rediscounts and business of the bank, or date May 17th, 1892, and July 12th, 1892, as follows:

The report of May 17th was sworn to by W. C. Denney, cashier, and attested by James Joyce, E. J. Butler and H. G. Allis, directors, and showed "Notes and bills rediscounted, \$16,132.40."

The report of July 12th was sworn to by H. G. Allis, president, and attested by Chas. T. Abeles, E. J. Butler and John W. Goodwin, directors, and showed notes and bills rediscounted \$81,748.80.

OSCAR DAVIS, a witness for plaintiff, testified as follows:

Q. Where do you live?

A. Little Rock.

Q. What is your business?

A. Cashier German national bank.

Q. How long have you been cashier of that bank?

A. A little over seven years—since January, 1889.

Q. Up to and prior to the year 1893, what was the custom of your bank in reference to rediscounts? In other words, by whom was the rediscounting usually done?

A. The cashier usually.

Q. Did the president have anything to do with it as a rule?

A. Not as a rule; has made some on one occasion, perhaps two.

63 Q. Would he be consulted with by the cashier in reference to it?

A. Well, it has always been my practice to consult with the board.

Q. But I mean prior to 1893?

A. I think that was in 1891, at the time there was a decision passed, I believe it was in the National Bank case of Cincinnati.

Q. That was in 1893. Prior to that time, did the cashier or president consult with the board about making rediscounts?

A. Yes, sir, I always consulted with them subsequent to that

time. Prior to that time, we didn't adopt any resolutions. Subsequent to that time we adopted resolutions authorizing it.

Q. I will ask you about the extent to which rediscounts were made. Did your bank discount every year to any considerable extent?

A. Yes, sir, we discounted every year until the last three, I believe, or two, in various amounts, depending altogether on the supply and demand of money year. I think it was in the year 1891 we discounted quite extensively to help out some of our neighbor banks who didn't have as good opportunities for discounting as we had.

Q. I will ask you in reference to the discounts of the banks generally in Little Rock, what you know about their rediscounting?

A. Oh, it is customary every year, every summer, to rediscount. Almost all the banks rediscount every summer.

#### Cross-examination:

Q. What is the custom of banks generally in regard to discounting. Do they not require evidence that the officer of the bank who desires to rediscount paper, has authority from the board of directors?

A. That is required now, but it was not prior to that decision.

Q. The banks of New York and other commercial cities commonly require that, do they not?

(The plaintiff objected to the above question as incompetent, but the court overruled said objection, and plaintiff saved its exceptions.)

A. They do now.

Q. That is the common course of business with banks, isn't it?

A. It is now, after that decision was rendered, with New York, St. Louis and Chicago banks.

64 Q. Banks have no difficulty in transacting business after that mode, do they? It does not embarrass the transaction of business?

A. No, not at all.

#### Redirect:

Q. It is only since that decision that was made?

A. Yes, sir. The banks in these money centers got out circular letters notifying all their clients in the West and South; principally, they are the borrowing sections.

Q. Now, Mr. Davis, wasn't that since the First national bank failed?

A. Well, the First national bank failed in January, 1893. Yes, sir, it was after.

Plaintiff offered to introduce in evidence to the jury the report of the Comptroller of the Currency made in 1893, at page 299, as to the condition of national banks in Arkansas, showing as follows:

"Notes rediscounted" December 9, \$352,730.49; March 9, \$82,327.10; May 4, \$10,500.00; July 12, \$96,495.29; October 3, \$127,864.81.

To which the defendant objected and the court sustained the objection, and refused to allow plaintiff to introduce said report in evidence, to which ruling of the court, the plaintiff at the time, and in due form, excepted.

Plaintiff also offered to introduce in evidence to the jury the report of the Comptroller of the Currency for 1893, at page 273, showing the condition of national banks for 1892, which shows: "Notes and bills rediscounted," March 1, \$8,517,205.36; May 17, \$9,090,080.27; July 12, \$9,181,656.14; September 30, \$17,132,487.71; December 9, \$15,775,618.63.

To the introduction of which the defendant objected, and the court sustained the objection and refused to allow plaintiff to introduce said report in evidence, to which ruling of the court, the plaintiff at the time, and in due form, excepted.

*Defendant's Testimony.*

Thereupon, the defendant, to sustain the issues on its part, introduced the following testimony, to wit:

E. J. BUTLER testified as follows:

Q. Were you a member of the board of directors of First national bank in the year 1892?

A. Yes, sir.

65 Q. What was the custom of that bank in regard to taking paper for discount? How was it done?

A. The paper was usually handed in to the cashier in the morning with a statement of what they wanted, and sometimes the paper itself, and sometimes a statement of what they wanted. The cashier would enter the notes upon what is called a discount book, and the board would meet at half past ten or eleven o'clock and pass upon the paper.

Q. Had you a discount board that attended to these transactions?

A. Yes, sir.

Q. Who composed that board?

A. There were always three directors.

Q. Three directors of the national bank composed the discount board?

A. Yes, sir.

Q. And when a note was to be discounted by the bank, it was first handed to the cashier and entered by him upon the book, and then the members of the board passed upon the question as to whether the bank would take it?

A. Whether they would accept or reject it.

Q. A record was made of that?

A. Yes, sir.

Q. Is that the book on which said records were made (handing witness book)?

A. Yes, sir.

(It is conceded by the plaintiff that Mr. Butler was a member of the discount board for the period when the notes in suit would have been presented to that board, if presented at all; that it was the custom of the bank to make the record of such transactions, and that Mr. Butler, after a careful search of the discount book, testifies that there is no record that any one of the notes in suit was ever presented to the discount board for the use of the bank.)

Q. Was there any other method by which said notes could be presented to the bank and become the property of the bank?

A. No, sir; none that I know of.

Q. How often did that discount board meet?

A. Every day. At one time they met at half past ten, and after that at 11 o'clock.

Q. Explain to the jury, Mr. Butler, from that book, what would appear on it and how it is evidenced if the note is accepted by the bank, or if it is rejected.

A. The entries of the offerings are made in this book and president or cashier would read what was offered, stating the time the note was given, for what amount, and the indorsers, and the board  
66 would vote upon it as to whether it should be accepted or rejected, and if the majority of the board were in favor of rejecting the discount offered, it would be so marked in the margin.

Q. Do the members of that board sign that record each day?

A. Yes, sir; those present sign.

Q. You find the signatures of the different members upon that record for each day?

A. I do. I find the record of the signatures of the directors present, approving or rejecting the offering.

Q. Who was president of the First national bank the year 1892?

A. H. G. Allis.

Q. Were you a regular attendant at the board meetings of the bank during that year?

A. Pretty regular, yes, sir; nearly all the meetings.

Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

A. Never that I knew of. I knew that when Col. Roots was president, he asked and received authority from the board to make rediscounts, but I do not know that Mr. Allis ever asked, and the board, when I was present—he never was given any authority to make rediscounts for the bank.

Q. Did he have authority from the bank to indorse its paper for rediscount?

A. No, sir; never that I was aware of.

Cross-examination:

Q. Did he ever ask for authority at any time?

A. I do not recollect of his having asked.

Q. Did the question ever come before the board as to rediscounts?

A. No, sir.

Q. So there was no question ever presented to the board as to the

authority of any one to rediscount after he came in there as president?

A. Not that I know of.

Q. The bank did rediscount paper, quite a large amount, after he went in as president, did it not?

A. Well, I do not know that ever I heard of it until after this trouble came up.

Q. Well, don't you know that it did rediscount paper—a good deal of it?

A. Well, I do not know how much. I know there were some rediscounts made.

Q. At all events, the question was never brought before the board as to the power of any one to rediscount paper after Allis went in as president?

A. Not that I remember.

67 Q. And you cannot say anything about the rediscounts?

A. No, sir.

Q. Are you sure you never heard of any rediscounts being made?

A. I do not recollect now. I know there were rediscounts made, but I cannot recollect any particular rediscounts, but in case there were, I would suppose it was by authority of the board during some time while I was absent.

Q. But you don't know it to be a fact?

A. No, sir.

Q. You don't remember the question ever having been brought up at all?

A. No, sir.

Q. There are a couple of statements made by the bank (being the statements heretofore introduced by the plaintiff) of May 17th, 1892, and July 12th, 1892, to which you as a director certify, which show, one of May 17th, shows rediscounts \$16,172.40, and the one of July 12th, 1892, shows rediscounts \$81,748.88. Did you sign these?

A. I couldn't say without referring to the original reports.

Q. These are the published reports, are they not?

A. They purport to be the published report but I do not know anything about it. I was one of the directors at that time.

Q. That is one of the usual forms of the reports published in the papers, isn't it?

A. Yes, sir.

Q. You now tell the jury that you do not know anything about the extent of rediscounts made by it?

A. No, sir; I cannot remember.

Redirect:

Q. Who was the cashier of the bank during 1892?

A. Mr. Denney.

Q. Do you know whether he transacted the business as to indorsing and rediscounting for the bank?

A. I always supposed that he did; I do not know.

Q. Did you know at any time of Mr. Allis transacting any business of that sort for the bank—of rediscounting?

A. I cannot recollect.

Q. Did you know that he had used the name of the bank upon the particular notes in suit before the bank failed? Did you get the knowledge before the bank failed?

A. No, sir; I do not think I ever heard of it until after the bank failed.

Q. Did you know of any instance in which Mr. Allis indorsed the name of the First national bank upon paper for rediscount?

68 A. Why I have seen paper as a witness in the courts here.

Q. Was not all of that paper like this refuted by the bank?

A. Yes, sir.

Q. Did you have any knowledge of any of these transactions until suits arose, or controversies arose in regard to them?

A. Never.

Q. Did any of these controversies arise until after the bank had failed?

A. No, sir; none that I ever heard of.

N. KUPFERLE, a witness for defendant, testified as follows:

Q. Were you a director of the First national bank in the year 1892, during the entire year?

A. Yes, sir.

Q. Did you hear Mr. Butler's testimony in regard to the method of transacting business, and the record that was kept for the discounting of notes?

A. Yes, sir.

Q. Is it your recollection that his statement of that is the method that was pursued by the bank?

A. Yes, sir; that is proper.

Q. Was you a member of that discount board during that year?

A. I think I was.

(It is conceded by the plaintiff that Mr. Kupferle was a member of the discount board for the period when the notes in suit would have been presented to that board, if presented at all; that it was the custom of the bank to make a record of such transactions, and that Mr. Kupferle after a careful search of the discount book, testifies that there is no record that any one of the notes in suit was ever presented to the discount board for the use of the bank.)

Q. Mr. Kupferle, did Mr. Allis have the power from the board of directors of the First national bank to indorse its paper for rediscount, or to rediscount it?

A. No, sir; never did.

Cross-examination:

Q. Was there anything ever said by the board, or before the board, Mr. Kupferle, about the power of Allis to rediscount paper?

A. No, sir; not that I recollect.

Q. Was the question ever brought before the board at all while Allis was president, about rediscounting paper?

A. No, sir.

69 Q. The bank rediscounted paper, did it not, during that time?

A. Yes, sir.

Q. Who generally attended to that?

A. Cashier.

Q. Did he always attend to it?

A. Yes, sir; it is customary.

Q. Don't you know that Allis frequently rediscounted paper?

A. No, sir; I do not.

Q. Who was the chief officer in that bank during that time? Who was the manager of the bank at that time, while Allis was there?

A. The chief officer, I considered the cashier.

Q. Not what you considered, but didn't Mr. Allis during the time he was president act as general manager of the bank and have general control?

A. Yes, sir; as president.

Q. And didn't he direct everything to be done there, and require it to be done, just as he wanted it pretty much, during that time?

A. I guess he directed most of the business, or all the business while he was there.

Q. Didn't he look after and supervise everything and direct the cashier what to do while he was there principally?

A. That is something I couldn't tell you, whether he did everything.

Q. As a rule, wasn't he the manager of the bank?

A. Yes, sir.

Q. And didn't the cashier act under his control as a rule?

A. I guess so; yes, sir.

Q. And didn't the cashier do everything he told him to do?

A. That is something I couldn't tell you.

Q. As a rule, I am speaking about.

A. There is a good deal of business to be transacted by the cashier over which the president has no power.

Q. Don't you know that Mr. Allis directed the affairs of that bank almost entirely?

A. As president he did; yes, sir.

Q. Don't you know that he undertook the direction of the cashier in everything almost?

A. No, sir; I do not know whether he did in everything or not.

Q. Don't you know that he required the cashier to do almost everything just as he told him?

A. He might have required of him a great many things which I do not know anything about.

70 Q. You was about there and you knew the power he exercised?

A. Yes, sir, he did use his power, of course.

Q. Now, you know that that bank was rediscounting paper?

A. Yes, sir.

Q. Neither Allis nor Denney ever called on the board for authority to rediscount paper, did they?



A. I recall only once where the president requested of the board that the bank should borrow some more money.

Q. That was only once. When was that?

A. That was in the fall of 1892.

Q. You knew the bank had been rediscounting paper long before that and borrowing money before that?

A. Yes, sir.

Q. And no authority had been asked of the board to do it?

A. No, sir.

Q. And that is the only time that you can remember that the authority was asked by Allis or any one else while he was there?

A. He asked or requested the board of directors to give their consent to borrowing more money.

Q. That was the only time?

A. The only time I recollect.

Q. You knew, however, that they were borrowing money and rediscounting paper continually?

A. Yes, sir.

Redirect:

Q. How many members of the board of directors was there in the year 1892?

A. If I am not mistaken, I think we had either 11 or 13, I forget which.

Q. It varied at different times?

A. Yes, sir.

Q. Never was less than eight or nine?

A. No, sir.

Q. When you spoke of a meeting of the board of directors, you referred to a full meeting, did you, of all the members?

A. Well, we very seldom had a meeting where all the directors were present.

Q. I mean by that you had a majority of all the members present?

A. A majority of the board, yes, sir.

Q. You had a daily meeting of the discount board, didn't you?

A. Yes, sir.

71 Q. Did they at any time rediscount, or authorize the rediscounting of paper? Did they have that authority?

A. No, sir, that was not their business.

Q. Theirs was to discount paper for customers of the banks?

A. The daily offerings, yes, sir.

Q. Did you ever know of Mr. Allis indorsing the name of the bank upon its paper for the purpose of rediscounting it?

A. No, sir, never did.

Q. The paper that has turned up here that was indorsed by him has been paper that was never in the bank, hasn't it?

A. I never saw that paper.

Q. Did you, as a member of the board of directors, or otherwise,

have any information that Mr. Allis was using the name of the bank upon his, or other people's paper, for accommodation?

A. No, sir, I never did.

Cross-examination:

Q. You didn't know he was using the name of the bank on the bank's paper?

A. No, sir.

Q. You knew he was discounting paper?

A. No, sir, it was not his place.

Q. Didn't the correspondence there show he was sending the paper for discount all over the country?

A. No, sir, I don't know anything about that.

Q. Wasn't it your business to know it?

A. I do not know.

Q. You was vice-president and one of the directors?

A. Yes, sir. I never knew anything about it until the failure of the bank—that he ever used the bank's name.

C. T. ABELES, a witness for defendant, testified as follows:

Q. Were you a director of the First national bank in the year 1892?

A. Yes, sir.

Q. Did you serve upon the discount board at different times during that year?

A. Yes, sir, I did.

Q. Was the custom that was pursued by the bank, in reference to the transactions, that Mr. Butler and Mr. Kupferle have detailed, about taking paper for discount, the common custom of the bank?

A. Yes, sir.

(It is conceded by the plaintiff that Mr. Abeles was a member of the discount board for the period when the notes in suit  
72 would have been presented to that board, if presented at all; that it was the custom of the bank to make a record of such transactions, and that Mr. Abeles, after a careful search of the discount book, testifies that there is no record that any one of the notes in suit was ever presented to the discount board for the use of the bank.)

Q. Mr. Abeles, did Mr. Allis, as president of the First national bank, in the year 1892, have authority from the board of directors to indorse the name of the bank upon notes, or to rediscount them for the bank?

A. Not while I was there was any such authority given.

Q. Did you have any information that he had ever done such a thing in the name of the bank?

A. Not until after the failure of the bank.

Cross-examination:

Q. Was there anything ever brought before the board in reference to rediscounting?

A. I do not think it was ever mentioned in it while I was there.

Q. The authority of any one to rediscount was never mentioned before the board that you remember?

A. Not during my time, the short time I was there.

Q. You knew that the bank was rediscounting paper, did you not?

A. Yes, sir.

Q. And that somebody was transacting that part of the business, did you?

A. Yes, sir.

Q. Did you ever stop to inquire as to who it was doing it and by what authority?

A. Yes, sir; I think I have. I have been told the authority vested in the cashier.

Q. Did you stop to inquire who was doing that?

A. Well, as I say, I inquired of some of the directors.

Q. Did you inquire of Allis or Denney who was doing the rediscounting, and where they were doing it?

A. I do not recollect that I did.

M. M. COHN, a witness for defendant, testified as follows:

Q. Are you a director of the First national bank?

A. Yes, sir.

Q. During what period?

A. I was not a director in the year 1892.

73 Q. You went out in January, 1892?

A. I think so; yes, sir.

Q. How long had you been a director prior to that time?

A. Ten years or more.

Q. Was Mr. Allis president of the bank in the year 1891?

A. He was.

Q. Did he have authority from the board of directors in that year to endorse the name of the bank upon its paper, or to rediscount it?

A. I do not remember.

Q. Did he perform services of that sort for the bank that you knew of as director?

A. Not that I now remember of.

Cross-examination:

Q. Was the question ever brought up before the board while you was there as to who had authority?

A. I do not remember that it ever has.

Q. The question never presented itself to you or your mind?

A. So far as I now remember, it has not.

Q. Didn't you know that rediscounting was being done by the bank?

A. Well, I knew so from the statements.

Q. You didn't know by whom it was being done, or anything of that kind?

A. Well, I supposed it was being done by the cashier.

Q. Did you know?

A. I did not.

Q. Didn't stop to inquire?

A. I did not.

Redirect :

Q. Who was authorized in the bank to perform that duty?

A. I understood the cashier.

Cross-examination :

Q. How was he authorized?

A. By law.

Q. You are simply giving your legal opinion?

A. Well, I understood that was his authority.

The depositions of Geo. R. Brown and James Joyce were here read, from transcript in former case, as follows:

74

*Deposition.*

GEO. R. BROWN, being duly sworn, testified as follows :

Q. What is your name?

A. George R. Brown.

Q. Are you the George R. Brown who is mentioned as payee in those notes? (Hands witness notes in suit.)

A. Yes, sir.

Q. Three of them?

A. Yes, sir.

Q. For what purpose did you endorse the notes?

A. For accommodation.

Q. Did you receive any consideration at all?

A. I did not.

Q. Were you indebted to the City Electric street railway at that time?

A. No, sir.

Q. To whom did you deliver the notes after indorsement?

A. To Mr. Allis.

Q. H. G. Allis?

A. Yes, sir.

Cross-examination :

Q. You say you were not president of the City Electric street — at that time?

A. No, sir; I never was president.

Q. You had nothing to do with the City Electric Street Railway Company?

A. I am not certain about at that time. I was a director at one time and secretary of the company.

JAS. JOYCE, being duly sworn, testified as follows :

Q. What is your name?

A. James Joyce.

Q. Are you the James Joyce to whom this note was payable?  
(Hands witness one of the notes in suit.)

A. Yes, sir.

Q. And this one also? (Handing witness another note.)

A. Yes, sir.

Q. Did you indorse the notes?

A. It is my handwriting; yes sir.

Q. Did you receive any consideration for the indorsement?

A. No, sir; none whatever.

Q. Were you a member of the McCarthy & Joyce Company?

A. Yes, sir.

Q. Did the McCarthy & Joyce Company ever receive any consideration for the making of those notes?

A. None whatever.

75 Cross-examination :

Q. For what purpose were these notes executed, Mr. Joyce?

A. The object in giving those notes was to raise money for the McCarthy — Joyce Company.

Q. For the McCarthy & Joyce Company?

A. Yes, sir.

Q. You say they received no consideration for them?

A. None whatever.

Q. You indorsed them?

A. Yes, sir.

Q. They were signed by the McCarthy & Joyce Company?

A. Yes, sir.

Q. To whom were they delivered?

A. To Mr. Allis, I believe.

(It is agreed by counsel that the signature of H. G. Allis individually and as president on the five notes in suit is the genuine signature of H. G. Allis, and that all were made by him.)

Q. Was Mr. Allis at that time the president of the First national bank?

A. Yes, sir.

Q. Your company was doing business with the First national bank?

A. Yes, sir.

Q. Owing the First national bank, was it not?

A. I reckon so.

Q. These notes were given for the purpose of being negotiated and the proceeds placed to your credit at the First national bank, were they not?

A. Yes, sir; that was the way I understood it.

## Redirect examination :

Q. Did you receive any credit for the proceeds of these notes, in any form?

A. None whatever.

Q. Were they used for the purpose for which you delivered them to Mr. Allis?

A. No, sir.

C. H. Yost, a witness for defendant, testified as follows :

Q. What is your occupation?

A. I am clerk for the receiver of the bank.

Q. Are you a book-keeper by profession?

A. Yes, sir.

76 Q. How long have you pursued that calling?

A. About six years.

Q. Were you a book-keeper for the First national bank before it failed?

A. Yes, sir.

Q. What positions did you occupy in that bank?

A. I had worked in nearly every department of the bank.

Q. Did you keep books in the bank?

A. Yes, sir, I had kept all of the different sets of books at some period during the time I worked there. I was teller of the bank when it suspended.

Q. Are you familiar with the books of the First national bank?

A. Yes, sir.

Q. Examine the notes that are sued on in this case and turn to the books of the bank, where in the ordinary course of book-keeping, they would appear, and state whether they appear in any form upon the books of the bank.

A. I have here the five notes that are in suit. I have examined each of the notes, and have examined the bills receivable book of the bank, which I introduce here in testimony, and there is no record whatever of the notes upon the bills receivable book.

Q. Is there any other place in the bank where they would appear upon record, except probably in the discount book?

A. The bills receivable is the book of record for papers of this kind. It is the only book that they would be entered in; that is, all the notes that were payable in Little Rock were entered in this book.

Q. Do they appear in that book at all?

A. No, sir.

Q. Upon November 30th, 1892, the Dickinson Hardware Company discounted a note, dated November 30th, due in ninety days, making it due March 1st, 1893, for \$2,500, secured by stock, and on December 3rd, the same company discounted a note for \$5,000 due in four months. Can you trace these notes upon the books of the bank?

A. Yes, sir, I think this book shows the notes.

(It is conceded by plaintiff that the notes appear on the bills receivable book.)

Q. Can you turn to the five notes in suit and trace the proceeds of these notes?

A. These notes were discounted by the U. S. national Bank of New York, prior to December 17th, 1892, and on that day, there was a charge against the United States national bank for the face of the notes, amounting to \$32,500; on the same day, there

77 were two credits made on the books, aggregating \$32,500.

One of them was a credit to the individual account of H. G. Allis for \$25,000. The other was a credit to rediscounts for \$7,500. Both credit tickets show on their face that the funds were gotten through the United States national bank.

Q. Now, explain to the jury what these tickets are and who made them and what is done with them.

A. The first ticket I read, which is a charge ticket, reads as follows: "First national bank, Little Rock, Ark., December 17th, 1892. Charge United States national bank, New York, for proceeds, Allis, \$25,000; rediscounts \$7,500; total \$32,500." (Signed) "H. G. Allis, president First national bank." This is the authority for an entry charging the United States national bank with the face of the notes that were then in their hands, and that are sued upon. It shows that that amount of money had been placed by the United States national bank to the credit of the First National Bank of Little Rock.

Q. And what is done at Little Rock?

A. The proper entry on the books of the First national bank would be a charge against the United States national bank.

Q. And the credit is made to him according to the ticket that you have exhibited?

A. Then a credit to offset this charge appears in two items, the first of which is a credit to H. G. Allis, which reads as follows: "Deposit in First national bank, Little Rock, Ark., by H. G. Allis, December 17th, 1892," and then the ticket reads "United States national bank \$25,000.00," which means that Mr. Allis had procured \$25,000.00 of the United States national bank which was placed to his credit. The other ticket reads: "Deposited in First national bank, Little Rock, Ark., by rediscounts December 17th, 1892," and the description is "U. S. national bank \$7,500.00," which is the proper entry if a note of the bank has been rediscounted. If a note belonging to the bank is rediscounted, the correct entry is to credit rediscounts and charge the bank who has taken the note. The charge and the credit offset each other.

Q. Who then got the benefit of the \$25,000 from that transaction?

A. The credit here is a credit to the individual account of Allis and is placed there subject to his check. It was obtained by Allis in New York, and the credit to the First national bank on the United States national bank books was simply a switching of balances.

Q. Did the First national bank get the benefit in any way of any part of that \$25,000.00?

78 A. No, sir, the money was placed directly to the credit of H. G. Allis and was used by him.

Q. Whose signatures do these papers bear that you have read to the jury?

A. The charge ticket is signed by H. G. Allis as president of the bank. Well, in fact, only charge tickets were signed by the officers or were required to be signed. All the tickets are in the handwriting of H. G. Allis.

Q. They are all in the handwriting of H. G. Allis?

A. Yes, sir. The entries were made on the books according to the tickets which I have just testified from.

Q. Can you turn to the books and state whether H. G. Allis drew that money out of the bank?

A. H. G. Allis continued to draw checks and make deposits from that time until about the time he went out as president of the bank, which was January, 1893.

Q. Was he continuously indebted to the bank thereafter?

A. I think that he was.

Q. What was his indebtedness to the bank as far as you can judge from the books at the time of the failure?

A. His individual account only showed an overdraft of \$380, but he was indebted to the bank in other ways.

Q. His overdrafts had been settled by notes, had they not, and entered up upon the books accordingly?

A. The overdraft had been settled by a switching of credits prior to the time he went out as president.

Q. Read the letter of H. G. Allis of December 13th 1892, the list of notes there stated, and state whether the entries there correspond with the entries made in accordance with the tickets that you have just testified about—whether the amounts there correspond. The letter describes the five notes and the two Dickinson Hardware Company notes.

(It is conceded that these entries refer to the notes described by Allis in his letter of December 13th, 1892.)

Q. What you have testified to here has been from your knowledge of the books, has it, Mr. Yost?

A. Yes, sir. I have had occasion to go over the books and compare the entries on the books with these charge tickets, together with a great many others.

#### Cross-examination:

Q. What amount was Allis indebted to the bank at the time these entries were made, according to these tickets you have referred to?

79 A. Well, I haven't a memorandum here of the amount he was indebted. He owed the bank something like \$50,000 in the way of notes that had been executed by himself individually.



Q. How much book account, overdraft, did he owe?

A. The individual account of H. G. Allis showed an overdraft of \$10,678.44 at the beginning of business on December 17th. By overdraft, I mean the amount that he owed the bank on his account, which was subject to check, and the account which received the deposits from time to time.

Q. There was that much balance against him?

A. That was the amount that he owed the bank.

This was all the testimony and evidence in the case on both sides.

80

*Plaintiff's Instructions.*

Thereupon the plaintiff requested the court to charge the jury as follows:

"The jury are directed to return a verdict for the plaintiff."

*Defendant's Instructions.*

And the defendant requested the court to charge the jury as follows:

"This is an action by the United States National Bank of New York against the receiver of the First National Bank of Little Rock, Ark., upon five promissory notes for \$5,000 each, three of which were executed by the City Electric Street Railway Company, payable to the order of G. R. Brown and H. G. Allis, indorsed by both of them, and further indorsed 'First national bank, Little Rock, Ark., H. G. Allis, pt. or ps.' Two were executed by McCarthy-Joyce Company to the order of James Joyce, indorsed James Joyce, H. G. Allis, also indorsed 'First national bank, Little Rock, Ark., H. G. Allis, pt.,' all bearing date December 7, 1892.

"The defendant in its answer denies the liability of the First national bank, because he says that the notes sued on were never the property of the bank, never were upon the books of the bank; that they had never been discounted by the defendant bank; that *that* their execution and discount by the plaintiff bank was a scheme or plan adopted by H. G. Allis to obtain money for his own use and benefit, and that the defendant bank never received any benefit whatever from the transaction."

2.

"These defenses would be an absolute bar to recovery by the plaintiff, and your verdict should be for the defendant, unless it shall appear that the plaintiff acted in good faith in the transaction and had no notice, express or implied, of the fraudulent character of the transaction or want of power or authority in Allis to bind the bank by his indorsement as president, and the procuring the discount of the notes by the plaintiff bank."

81

3.

"In determining whether Allis had authority to discount the notes for the bank, you are instructed that the mere fact that he was

president of the bank did not authorize him so to do. The president of a national bank has no authority by virtue of his office simply to bind the bank by indorsement of its name."

4.

"Before you find that he had implied authority by reason of the acquiescence of the directors of the defendant bank, you must find that the directors knew that he exercised such authority, or that he had been permitted, without their knowledge, to rediscount notes through a series of transactions such as would amount to a custom to do so, or else that the directors had knowledge that Allis carried on or negligently permitted him to carry on such a course of dealing with the plaintiff bank as to induce it to believe that they had conferred the power upon him to indorse or discount notes."

5.

"If the plaintiff bank received and discounted these notes under circumstances which were so much out of the course of ordinary and legitimate banking business as to require it to see to it that the agent or officer claiming to act for the defendant bank had special authority so to act, you should find for the defendant."

6.

"The borrowing of money by a national bank is so much out of the course of ordinary banking business as to require those making the loans to see to it that the officer or agent making the loan had special authority to borrow the money."

7.

"The jury are instructed that the president of a national bank has not authority to raise money by discounting the bank's notes without special authority from the board of directors. If, therefore, you find that the notes in suit were discounted by H. G. Allis without special authority of the board of directors, you will find  
82 for the defendant, unless you further find from the preponderance of the evidence that the defendant bank received the proceeds of the notes discounted."

8.

"Rediscounting paper actually owned by the bank is to all intents and purposes borrowing money by the bank obtaining the rediscount, where the paper rediscounted is indorsed by the bank obtaining the rediscount in such a manner as to permit recourse upon the indorsing bank, as in this case."

9.

"If the jury finds that it was the course of dealing between the plaintiff bank and the First national bank that notes were rediscounted by the former for the latter upon the credit and indorsement of the latter bank; that the former demanded that the latter should maintain with it a deposit to its credit sufficient to cover its

liability upon the rediscounted notes as they severally matured, and that a credit balance satisfactory to the plaintiff was maintained with it by the First national bank; that the rediscounted notes were charged upon its books by the plaintiff bank to the First national bank as they matured, and then sent to the First national bank in order to allow it to collect from the makers and prior indorsers for its own benefit, the transaction was a simple lending and borrowing of money; and if the jury finds that the notes in suit were discounted by the plaintiff bank in accordance with such course of dealing, they will find for the defendant, unless they find that the First national bank received the proceeds of such discount, or that Allis was authorized by the First national bank to make the discount for it."

## 10.

"The jury are instructed that the business of a national bank is to lend money, not to borrow it; to discount the notes of others, not to get its own notes discounted. If, therefore, you find that the plaintiff discounted the notes in suit, believing that they had been sent to it by an officer of the defendant bank for the purpose of raising money for the bank, then the transaction was so much  
83 out of the course of ordinary banking as to require the plaintiff to ascertain that the officer acting for the defendant bank had authority to raise the money on the notes for the bank; and if you find that the plaintiff discounted the notes without making inquiry as to the officer's authority, and further find that the officer sending the notes for discount had no special authority to raise money thereon, you must find for the defendant, unless you further find that the defendant bank received the proceeds of the notes."

## 11.

"The jury are instructed that the business of a bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. The fact, therefore, that the officers of a national bank make application to another national bank to discount or raise money upon notes is a circumstance which may be considered by them in connection with the other facts and circumstances to determine whether the plaintiff acquired the notes in due course of business."

## 12.

"If the jury finds that it is proved that H. G. Allis was in the habit of superintending the issuing of the defendant bank's paper, that would not justify the plaintiff in relying upon his having authority to issue the notes in suit, unless the evidence shows that the plaintiff knew that the defendant had previously acquiesced in such conduct on Allis' part."

## 13.

"If the jury finds that H. G. Allis was the payee or one of the payees in either of the notes in suit; that he indorsed the same in blank; that he then indorsed the name of the First national bank

immediately under his indorsement by himself as its president in such manner as to show it was done by him; that he himself transmitted said notes to the plaintiff bank in a letter signed by him as president and procured the plaintiff bank to discount said notes, your verdict should be for the defendant as to said notes, if you find that Allis made the endorsement of the bank's name for his personal benefit without authority from the bank, unless you further

84 find that the defendant bank ratified the action of Allis in discounting the notes."

## 14.

"If you find that Allis endorsed the name of the First national bank upon the notes in suit for his own benefit without authority from the First national bank, and that the plaintiff knew that fact, your verdict should be for the defendant.

The form of the notes in which Allis is payee and endorser was sufficient to carry notice to the plaintiff bank that he was using the First national bank's name for his personal benefit, if you find that these notes were delivered to the plaintiff bank for discount by Allis, although he professed to act as president of the First national bank and for its benefit in requesting the discount."

## 15.

"If you find that a part of the notes in suit were transmitted by Allis to the plaintiff with notes in which he was payee and last endorser, and that all said notes show that the name of the First national bank was endorsed thereon by Allis, you are at liberty to take those facts into consideration in determining whether the plaintiff knew that Allis was using the name of the First national bank for his benefit."

## 16.

"The jury are instructed that, however they may find the facts upon other issues, the receiver is entitled to recover of the plaintiff the amount of \$467.86, and they are directed to return a verdict for the receiver in that amount.

The court refused to give either of the prayers for instructions preferred by the defendant, but refused each of them separately, and, as each was refused, defendant at the time saved his separate exception to the court's action and order in refusing to give each of said prayers for instructions. Thereupon the court directed the jury to return a verdict for the plaintiff; to which action of the court the defendant at the time excepted.

Thereupon the jury, in obedience to the court's direction to that effect, thereafter given, returned the following verdict:

"We, the jury, in obedience to the court's direction, find the issues in favor of the U. S. Nat. Bank against Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Ark., and assess the plaintiff's damages at \$24,532.14.

85

GREEN TOMSUN, Foreman."

Before the judgment was rendered the defendant objected to any recovery against him for ordinary costs of suit, for the taxation of attorneys' fees, or for the costs incurred by the plaintiff in prosecuting its two several writs of error in this cause to the U. S. court of appeals for the 8th circuit; but the court overruled each of said objections and ruled that the plaintiff was entitled to recover its costs expended for each of the purposes aforesaid.

The defendant severally excepted to the court's ruling upon each of the questions aforesaid at the time they were made.

The defendant now, within the time prescribed by law and the rules of the court, presents to the court this its bill of exceptions, which is examined and allowed and ordered to be made a part of the record in this case.

In witness whereof I have hereunto set my hand, as judge of said court, this 19th day of June, 1897.

(Signed)

JOHN A. WILLIAMS, *Judge.*

Endorsed: Filed June 19, 1897. Ralph L. Goodrich, clerk.

Which assignment of errors is as follows:

U. S. NATIONAL BANK

vs.

STERLING R. COCKRILL, as Receiver of First National Bank of Little Rock.

The defendant makes the following assignment of errors, viz:

1st. The court erred in directing the jury to return a verdict for the plaintiff.

2nd. The court erred in admitting the notes sued on in evidence.

3rd. The court erred in refusing to give to the jury the first declaration of law asked for by the defendant, the same being in the following words, viz:

86 "This is an action by the United States National Bank of New York against the receiver of the First National Bank of Little Rock, Ark., upon five promissory notes for \$5,000 each, three of which were executed by the City Electric Street Railway Company, payable to the order of G. R. Brown and H. G. Allis, indorsed by both of them, and further indorsed, 'First national bank, Little Rock, Ark., H. G. Allis, Pt. or Ps.' Two were executed by McCarthy-Joyce Company, to the order of James Joyce, indorsed James Joyce, H. G. Allis; also indorsed, 'First national bank, Little Rock, Ark., H. G. Allis, Pt.,' all bearing date December 7th, 1892.

The defendant in its answer denies the liability of the First national bank, because he says that the notes sued on were never the property of the bank—never were upon the books of the bank; that they had never been discounted by the defendant bank; that their execution and discount by the plaintiff bank was a scheme or plan adopted by H. G. Allis to obtain money for his own use and benefit, and that the defendant bank never received any benefit whatever from the transaction."

4th. The court erred in refusing to give to the jury the second declaration of law asked for by the defendant, the same being in the following words, viz:

"These defenses would be an absolute bar to recovery by the plaintiff, and your verdict should be for the defendant, unless it shall appear that the plaintiff acted in good faith in the transaction and had notice, express or implied, of the fraudulent character of the transaction or want of power or authority in Allis to bind the bank by his indorsement, as president, and the procuring the discount of the notes by the plaintiff bank."

5th. The court erred in refusing to give to the jury the third declaration of law asked for by the defendant, the same being in the following words, viz:

"In determining whether Allis had authority to discount the notes for the bank you are instructed that the mere fact that he was president of the bank did not authorize him so to do. The president of a national bank has no authority by virtue of his office simply to bind the bank by indorsement of its name."

87 6th. The court erred in refusing to give to the jury the fourth declaration of law asked for by the defendant, the same being in the following words, viz:

"Before you find that he had implied authority, by reason of the acquiescence of the directors of the defendant bank, you must find that the directors knew that he exercised such authority, or that he had been permitted without their knowledge to rediscount notes through a series of transactions such as would amount to a custom to do so, or else that the directors had knowledge that Allis carried on or negligently permitted him to carry on such a course of dealing with the plaintiff bank as to induce it to believe that they had conferred the power upon him to indorse and discount notes."

7th. The court erred in refusing to give to the jury the — declaration of law asked for by the defendant, the same being in the following words, viz:

"If the plaintiff bank received and discounted these notes under circumstances which were so much out of the course of ordinary and legitimate banking business as to require it to see to it that the agent or officer claiming to act for the defendant bank had special authority so to act, you should find for defendant."

8th. The court erred in refusing to give to the jury the sixth declaration of law asked for by the defendant, the same being in the following words, viz:

"The borrowing of money by a national bank is so much out of the course of ordinary banking business as to require those making the loans to see to it that the officer or agent making the loan had special authority to borrow the money."

9th. The court erred in refusing to give to the jury the seventh declaration of law asked for by the defendant, the same being in the following words, viz:

"The jury are instructed that the president of a national bank has not authority to raise money by discounting the bank's notes without special authority from the board of directors.



If, therefore, you find that the notes in suit were discounted by H. G. Allis without special authority of the board of directors, you will find for the defendant, unless you further find from  
88 the preponderance of the evidence that the defendant bank received the proceeds of the notes discounted."

10th. The court erred in refusing to give to the jury the eighth declaration of law asked for by the defendant, the same being in the following words, viz :

"Rediscounting paper actually owned by a bank is, to all intents and purposes, borrowing money by the bank obtaining the rediscount where the paper rediscounted is indorsed by the bank obtaining the rediscount in such a manner as to permit recourse upon the indorsing bank, as in this case."

11th. The court erred in refusing to give to the jury the ninth declaration of law asked for by the defendant, the same being in the following words, viz :

"If the jury finds that it was the course of dealing between the plaintiff bank and the First national bank that notes were rediscounted by the former for the latter upon the credit and indorsement of the latter bank ; that the former demanded that the latter should maintain with it a deposit to its credit sufficient to cover its liability upon the rediscounted notes as they severally matured, and that a credit balance satisfactory to the plaintiff was maintained with it by the First national bank ; that the rediscounted notes were charged upon its books by the plaintiff bank to the First national bank as they matured and then sent to the First national bank, in order to allow it to collect from the makers and prior indorsers for its own benefit, the transaction was a simple lending and borrowing of money ; and if the jury finds that the notes in suit were discounted by the plaintiff bank in accordance with such course of dealing, they will find for the defendant, unless they find that the First national bank received the proceedings of such discount or that Allis was authorized by the First national bank to make the discount for it."

12th. The court erred in refusing to give to the jury the tenth declaration of law asked for by the defendant, the same being in the following words, viz :

"The jury are instructed that the business of a national bank is to lend money, not to borrow it ; to discount the notes of  
89 others, not to get its own notes discounted. If, therefore, you find that the plaintiff discounted the notes in suit, believing that they had been sent to it by an officer of the defendant bank, for the purpose of raising money for the bank, then the transaction was so much out of the course of ordinary banking as to require the plaintiff to ascertain that the officer acting for the bank had authority to raise the money on the notes for the bank ; and if you find that the plaintiff discounted the notes without making inquiry as to the officer's authority, and further find that the officer sending the notes for discount had no special authority to raise money thereon, you must find for the defendant, unless you further find that the defendant bank received the proceeds of the notes."

13th. The court erred in refusing to give to the jury the eleventh declaration of law asked for by the defendant, the same being in the following words, viz :

"The jury are instructed that the business of a bank is to lend, not to borrow, money ; to discount the notes of others, not to get its own notes discounted. The fact, therefore, that the officers of a national bank make application to another national bank to discount or raise money upon notes is a circumstance which may be considered by them, in connection with the other facts and circumstances, to determine whether the plaintiff acquired the notes in the due course of business."

14th. The court erred in refusing to give to the jury the twelfth declaration of law asked for by the defendant, the same being in the following words, viz :

"If the jury finds that it is proved that H. G. Allis was in the habit of superintending the issuing of the defendant bank's paper, that would not justify the plaintiff in relying upon his authority to issue the notes in suit, unless the evidence shows that the plaintiff knew that the defendant had previously acquiesced in such conduct on Allis' part."

15th. The court erred in refusing to give to the jury the thirteenth declaration of law asked for by the defendant, the same being in the following words, viz :

"If the jury finds that H. G. Allis was the payee, or one of the payees in either of the notes in suit ; that he endorsed the same in blank ; that he then endorsed the name of the First national bank immediately under his endorsement by himself as its president in such manner as to show it was done by him ; that he himself transmitted said notes to the plaintiff bank in a letter signed by him as president, and procured the plaintiff bank to discount said notes, your verdict should be for the defendant as to said notes, if you find that Allis made the endorsement of the bank's name for his personal benefit without authority from the bank, unless you further find that the defendant bank ratified the action of Allis in discounting the notes."

16th. The court erred in refusing to give to the jury the fourteenth declaration of law asked for by the defendant, the same being in the following words, viz :

"If you find that Allis endorsed the name of the First national bank upon the notes in suit for his own benefit, without authority from the First national bank, and that the plaintiff knew that fact, your verdict should be for the defendant."

The form of the notes in which Allis is payee and endorser was sufficient to carry notice to the plaintiff bank that he was using the First national bank's name for his personal benefit if you find that these notes were delivered to the plaintiff bank for discount by Allis, although he professed to act as president of the First national bank and for its benefit in requesting the discount."

17th. The court erred in refusing to give to the jury the fifteenth declaration of law asked for by the defendant, the same being in the following words, viz :



"If you find that a part of the notes in suit were transmitted by Allis to the plaintiff with notes in which he was payee and last endorser, and that all said notes show that the name of the First national bank was endorsed thereon by Allis, you are at liberty to take those facts into consideration in determining whether the plaintiff knew that Allis was using the name of the First national bank for his benefit."

18th. The court erred in refusing to give to the jury the sixteenth declaration of law asked for by the defendant, the same being in the following words, viz:

"The jury are instructed that, however they may find the facts upon other issues, the receiver is entitled to recover of the plaintiff the amount of \$167.86, and they are directed to return a verdict for the receiver in that amount."

19th. The court erred in rendering judgment for costs against the defendant.

20th. The court erred in rendering judgment for an attorney's fee against the defendant.

21st. The court erred in adjudging that defendant was liable for costs incurred by plaintiff in prosecuting two writs of error to the U. S. court of appeals.

Wherefore defendant prays that its assignment of errors be allowed and filed, and that a writ of error issue herein.

COCKRILL & COCKRILL,

*Attorneys for Defendant.*

Allowed.

— — —, *Judge.*

Which citation is as follows:

The United States of America to United States National Bank,  
Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the eastern district of Arkansas, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Ark., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Williams, judge of the circuit court of the United States for the eastern district of Arkansas, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

JNO. A. WILLIAMS,

*United States District Judge for the  
Eastern District of Arkansas.*

Service acknowledged this 19th June, 1897.

RATCLIFFE & FLETCHER,

*Att'ys for Plaintiff.*

Endorsed : No. —. United States circuit court, western division of the eastern district of Arkansas. — vs. —. Citation. Filed 19 day of June, 1897. Ralph L. Goodrich, clerk.

UNITED STATES OF AMERICA,  
*Western Division of the Eastern District of Arkansas.* }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing and printed matter annexed to this certificate are true, correct, and compare-copies of the originals remaining of record in my office and constitute a true copy of the record and of the assignment of errors and of all proceedings in case United States National Bank *vs.* First National Bank of Little Rock and S. R. Cockrill, as receiver.

In witness whereof I have hereunto set my hand and the seal of said court this eighth day of July, in the year of our [SEAL.] Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-second.

Attest:

RALPH L. GOODRICH, *Clerk.*

Filed Aug. 11, 1897.

JOHN D. JORDAN, *Clerk.*

93 And on the twenty-first day of August, A. D. 1897, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following :

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

STERLING R. COCKRILL, Receiver, &c., Plaintiff in Error, }  
vs. } No. 984.  
UNITED STATES NATIONAL BANK.

The clerk will enter my appearance as counsel for the plaintiff in error.

S. R. COCKRILL.

Endorsed : U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 984. Sterling R. Cockrill, receiver, &c., plaintiff in error, *vs.* United States National Bank. Appearance. Filed Aug. 21, 1897. John D. Jordan, clerk. S. R. Cockrill, Little Rock, Ark., counsel for pl'ff in error.

And on the twenty-first day of September, A. D. 1897, an appearance of counsel for defendant in error was filed in the clerk's office

of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff in Error,	} No. 984.
<i>vs.</i> UNITED STATES NATIONAL BANK.	

The clerk will enter *my* appearance as counsel for the defendant in error.

JOHN FLETCHER.  
W. C. RATCLIFFE.

94      Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 984. S. R. Cockrill, as rec'r, etc., pl'ff in error, *vs.* United States National Bank. Appearance. Filed Sep. 21, 1897. John D. Jordan, clerk. John Fletcher, W. C. Ratcliffe, counsel for def't in error.

And on the twenty-eighth day of August, A. D. 1897, a motion to certify questions to the Supreme Court of the United States was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the United States Circuit Court of Appeals for the Eighth Circuit.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Ark., Plaintiff in Error,	}
<i>vs.</i> U. S. NATIONAL BANK, Defendant in Error.	

The plaintiff in error moves the court to certify to the Supreme Court of the United States such facts as it may deem necessary to a proper understanding of this cause for the purpose of determining the following questions, to be certified to that court, to wit:

First. Whether H. G. Allis, as president of the First National Bank of Little Rock, Arkansas, had authority to raise money by discounting the bank's notes without special authority from the board of directors.

Second. Whether the following state of facts constituted a loaning of money within the meaning of *Armstrong vs. Western National Bank*, 152 U. S., 346:

The United States national bank demanded that the First national bank should maintain with it a deposit to its credit sufficient to cover its liability upon all rediscounted notes as they severally matured. A credit balance satisfactory to the United States national bank was maintained with it by the First national bank. The United States national bank required the First national bank to

endorse the notes before it would advance any money upon them.

As the rediscounted notes matured, they were charged upon  
94½ the books of the United States national bank to the First  
national bank, and then sent to the latter bank for collection  
for its own benefit.

Third. Whether the following facts were sufficient to carry notice  
to the United States national bank that H. G. Allis was using the  
First national bank's name for his personal benefit, to wit:

H. G. Allis was payee in three of the notes in suit. The notes  
bore his individual endorsement in blank. Then, immediately  
under his individual endorsement, they bore the endorsement of  
the First national bank, by Allis, as its president, in such a manner  
as to show it was done by him. Allis transmitted the notes to the  
United States national bank in a letter signed by him as president,  
requesting the United States national bank to discount the notes for  
the First national bank and place the proceeds to the credit of the  
First national bank. As soon as he was apprised that the proceeds  
of the notes had been placed to the credit of the First national bank,  
he took credit upon the books of the First national bank for the

full amount of the proceeds and caused the United States  
95 national bank's account to be charged in the same amount,  
and thus received the entire benefit of the transaction. The  
notes were Allis' individual property.

Respectfully,

S. R. COCKRILL &  
ASHLEY COCKRILL,

*Attorneys for the Plaintiff in Error.*

Endorsed: 984. Sterling R. Cockrill, as receiver, &c., pl'ff in  
error, vs. United States National Bank. Motion to certify questions  
to Supreme Court. Filed Aug. 28, 1897. John D. Jordan, clerk.

And on the sixth day of September, A. D. 1897, in the record of  
the proceedings of said circuit court of appeals is an order denying  
motion to certify questions to the Supreme Court of the United  
States in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term,  
1897.

MONDAY, September 6, 1897.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Ark., Plaintiff in Error,	} No. 984.
vs.	
UNITED STATES NATIONAL BANK.	

In error to the circuit court of the United States for the eastern  
district of Arkansas.

This cause came on this day to be heard upon the motion filed by  
counsel for plaintiff in error to certify certain questions arising  
upon the record to the Supreme Court of the United States.

On consideration whereof it is now here ordered by this court  
that said motion be, and the same is hereby, denied.

And on the thirteenth day of September, A. D. 1897, a stipulation for submission was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

96 In the United States Circuit Court of Appeals, Eighth Circuit.

STERLING R. COCKRILL, Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff in Error,	}
vs.	
UNITED STATES NATIONAL BANK, Defendant in Error.	

*Stipulation.*

We agree that this cause may be submitted to the court upon the record recently filed herein without printing the same, upon the briefs filed in the same case on the former appeal.

S. R. COCKRILL,  
ASHLEY COCKRILL,  
*For Plaintiff in Error.*  
W. C. RATCLIFFE,  
JOHN FLETCHER,  
*For Defendant in Error.*

Endorsed: No. 984. In United States circuit court of appeals for eighth circuit. Sterling R. Cockrill, rec., vs. United States National Bk. Stipulation for submission. Filed Sep. 13, 1897. John D. Jordan, clerk.

And on the fifteenth day of September, A. D. 1897, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

WEDNESDAY, September 15, 1897.

STERLING R. COCKRILL, as Receiver of the First National Bank, Plaintiff in Error,	}	No. 984.
vs.		
UNITED STATES NATIONAL BANK.		

97 In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on this day to be heard upon the stipulation filed by counsel for the respective parties for a submission of this cause without oral argument.

Thereupon this cause was submitted to Judges Sanborn, Thayer, and Riner upon the transcript of the record from said circuit court

and the briefs of counsel filed in the case of The United States National Bank, plaintiff in error, vs. The First National Bank *et al.*, No. 823, December term, 1896.

And on the fifteenth day of September, A. D. 1897, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

WEDNESDAY, *September 15, 1897.*

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff in Error,	} No. 984.
vs.	
UNITED STATES NATIONAL BANK, Defendant in Error.	

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the United States National Bank have and recover against Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, the sum of twenty dollars for its costs herein, and have execution therefor.

September 15, 1897.

98 And on the twenty-seventh day of October, A. D. 1897, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff in Error,	}
vs.	
THE UNITED STATES NATIONAL BANK OF NEW YORK, Defendant in Error.	

*Assignment of Errors.*

The plaintiff in error, Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, makes the following assignment of errors in the above-entitled cause, to wit:

1. The circuit court of appeals erred in ruling that the trial court committed no error in directing a verdict in favor of the United States National Bank.

2. The said court erred in ruling that the following assignment of error, made by the plaintiff in error, was not well taken :

"This is an action by the United States National Bank of New York against the receiver of the First National Bank of Little Rock, Arkansas, upon five promissory notes for \$5,000.00 each, three of which were executed by the City Electric Street Railway Company, payable to the order of G. R. Brown and H. G. Allis, endorsed by both of them, and further endorsed 'First national bank, Little Rock, Ark., H. G. Allis, Pt. or Ps.' Two were executed by McCarthy-Joyce Company to the order of James Joyce, indorsed James Joyce, H. G. Allis; also endorsed 'First national bank, Little Rock, Ark., H. G. Allis, Pt.,' all bearing date December 7th, 1892.

The defendant in its answer denies the liability of the First national bank, because he says that the notes sued on were never the property of the bank, never were upon the books of the bank; that they had never been discounted by the defendant bank; that their execution and discount by the plaintiff bank was a scheme or plan adopted by H. G. Allis to obtain money for his own use and  
99 benefit, and that the defendant bank never received any benefit whatever from the transaction."

3. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit :

"These defenses would be an absolute bar to recovery by the plaintiff, and your verdict should be for the defendant, unless it shall appear that the plaintiff acted in good faith in the transaction, and had no notice, express or implied, of the fraudulent character of the transaction or want of power or authority in Allis to bind the bank by his endorsement as president and the procuring the discount of the notes by the plaintiff bank."

4. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit :

"In determining whether Allis had authority to discount the notes for the bank, you are instructed that the mere fact that he was president of the bank did not authorize him so to do. The president of a national bank has no authority, by virtue of his office simply, to bind the bank by indorsements of its name."

5. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit :

"Before you find that he had implied authority, by reason of the acquiescence of the directors of the defendant bank, you must find that the directors knew that he exercised such authority, or that he had been permitted without their knowledge to rediscount notes through a series of transactions such as would amount to a custom to do so, or else that the directors had knowledge that Allis carried on or negligently permitted him to carry on such a course of dealing with the plaintiff bank as to induce it to believe that they had conferred the power upon him to indorse or discount notes."

6. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit :

"If the plaintiff bank received and discounted these notes under circumstances which were so much out of the course of ordinary



and legitimate banking business as to require it to see to it that the agent or officer claiming to act for the defendant bank had special authority so to act, you should find for defendant."

7. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"The borrowing of money by a national bank is so much out of the course of ordinary banking business as to require those making the loans to see to it that the officer or agent making the loans had special authority to borrow the money."

8. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"The jury are instructed that the president of a national bank has not authority to raise money by discounting the bank's notes without special authority from the board of directors."

9. "If, therefore, you find that the notes in suit were discounted by H. G. Allis without special authority of the board of directors you will find for the defendant, unless you further find from the preponderance of the evidence that the defendant bank received the proceeds of the notes discounted."

10. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"Rediscounting paper actually owned by a bank is to all intents and purposes borrowing money by the bank obtaining the rediscount, where the paper rediscounted is indorsed by the bank obtaining the rediscount in such a manner as to permit recourse upon the endorsing bank, as in this case."

11. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"If the jury finds that it was the course of dealing between the plaintiff bank and the First national bank that notes were rediscounted by the former for the latter upon the credit and endorsement of the latter bank; that the former demanded that the latter should maintain with it a deposit to its credit sufficient to cover its liability upon the rediscounted notes as they severally matured, and that a credit balance satisfactory to the plaintiff was maintained with it by the First national bank; that the redis-

101 counted notes were charged upon its books by the plaintiff bank to the First national bank as they matured and then sent to the First national bank in order to allow it to collect from the makers and prior endorsers for its own benefit, the transaction was a simple lending and borrowing of money; and if the jury finds that the notes in suit were discounted by the plaintiff bank in accordance with such course of dealing they will find for the defendant, unless they find that the First national bank received the proceeds of such discount or that Allis was authorized by the First national bank to make the discount for it."

12. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"The jury are instructed that the business of a national bank is to lend money, not to borrow it; to discount the notes of others, not



to get its own notes discounted. If, therefore, you find that the plaintiff discounted the notes in suit, believing that they had been sent to it by an officer of the defendant bank for the purpose of raising money for the bank, then the transaction was so much out of the course of ordinary banking as to require the plaintiff to ascertain that the officer acting for the defendant bank had authority to raise the money on the notes for the bank; and if you find that the plaintiff discounted the notes without making inquiry as to the officer's authority, and further find that the officer sending the notes for discount had no special authority to raise money thereon, you must find for the defendant, unless you further find that the defendant bank received the proceeds of the notes."

13. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"The jury are instructed that the business of a bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. The fact, therefore, that the officers of a national bank make application to another national bank to discount or raise money upon notes is a circumstance which may be considered by them in connection with the other facts and circumstances to determine whether the plaintiff acquired the notes in the due course of business."

102 14. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"If the jury finds that it is proved that H. G. Allis was in the habit of superintending the issuing of the defendant bank paper, that would not justify the plaintiff in relying upon his having authority to issue the notes in suit, unless the evidence shows that the plaintiff knew that the defendant had previously acquiesced in such conduct on Allis' part."

15. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"If the jury finds that H. G. Allis was the payee or one of the payees in either of the notes in suit; that he endorsed the same in blank; that he then endorsed the name of the First national bank immediately under his endorsement, by himself as its president, in such manner as to show it was done by him; that he himself transmitted said notes to the plaintiff bank in a letter signed by him as president, and procured the plaintiff bank to discount said notes, your verdict should be for the defendant as to said notes, if you find that Allis made the endorsement of the bank's name for his personal benefit without authority from the bank, unless you further find that the defendant bank ratified the action of Allis in discounting the notes."

16. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"If you find that Allis endorsed the name of the First national bank upon the notes in suit, for his own benefit, without authority from the First national bank, and that the plaintiff knew that fact, your verdict should be for the defendant."

17. The form of the notes in which Allis is payee and endorser was sufficient to carry notice to the plaintiff bank that he was using the First national bank's name for his personal benefit, if you find that these notes were delivered to the plaintiff bank for discount by Allis, although he professed to act as president of the First national bank and for its benefit in requesting the discount."

103 18. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"If you find that a part of the notes in suit were transmitted by Allis to the plaintiff with the notes in which he was payee and last endorser, and that all said notes show that the name of the First national bank was endorsed thereon by Allis, you are at liberty to take those facts into consideration in determining whether the plaintiff knew that Allis was using the name of the First national bank for his benefit."

19. The said court erred in ruling that the following assignment of error made by the plaintiff in error was not well taken, to wit:

"The jury are instructed that, however they may find the facts upon other issues, the receiver is entitled to recover of the plaintiff the amount of \$467.86, and they are directed to return a verdict for the receiver in that amount."

Wherefore said receiver prays that said judgment be reversed.

S. R. COCKRILL,

*For Plaintiff in Error.*

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1897. No. 984. Sterling R. Cockrill, as receiver, &c., plaintiff in error, vs. United States National Bank of New York. Assignment of errors. Filed Oct. 27, 1897. John D. Jordan, clerk.

104

*(Petition for Writ of Error.)*

And on the twenty-third day of November, A. D. 1897, a petition for a writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

Supreme Court of the United States.

COCKRILL, as Receiver of the First National Bank of Little Rock,  
Arkansas, Plaintiff in Error, }

vs.

UNITED STATES NATIONAL BANK, Defendant in Error. }

Petition for writ of error.

Your petitioner represents that he is the receiver of the First National Bank of Little Rock, Arkansas, duly appointed by the Comptroller of the Currency of the United States in pursuance of the acts of Congress of the United States; that judgment was rendered against him in favor of the United States national bank for the sum of \$25,000, requiring him to pay said sum to said bank out of

the assets held by him by virtue of his appointment aforesaid; that under the direction of the comptroller aforesaid he caused said cause to be taken on writ of error to the United States circuit court of appeals for the 8th circuit, where said judgment was affirmed; that he is ag-grieved by said judgment, and is directed by the said comptroller to sue out a writ of error to review said judgment.

A record of said cause, duly certified by the clerk of said United States court of appeals, is presented herewith.

Wherefore said receiver prays that a writ in error issue herein to the United States circuit court of appeals.

STERLING R. COCKRILL,  
*Attorney for Receiver.*

STATE OF ARKANSAS, }  
County of Pulaski. }

I, S. R. Cockrill, state that the facts above set forth are true.

S. R. COCKRILL.

105 Subscribed and sworn to before me this 5th day of November, 1897.

[SEAL.]

THOS. J. DOYLE,  
*Notary Public.*

My commission expires May 8th, 1898.

Endorsed: No. 984. Sterling R. Cockrill, as receiver, etc., plaintiff in error, vs. United States National Bank. Petition for writ of error. Filed Nov. 23, 1897. John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-third day of November, A. D. 1897, an original writ of error was filed in the clerk's office of said circuit court of appeals in said cause, which is hereto attached and herewith returned:

106 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, plaintiff in error, and The United States National Bank of New York, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme  
Court of the United  
States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. MCKENNEY,

*Clerk of the Supreme Court of the United States.*

Allowed by—

DAVID J. BREWER,

*Associate Justice of the Supreme*

*Court of the United States.*

[Endorsed:] No. 984. Sterling R. Cockrill, as receiver, etc., plaintiff in error, vs. United States National Bank. Writ of error. Filed Nov. 23, 1897. John D. Jordan, clerk.

*Return to Writ.*

UNITED STATES OF AMERICA, }  
*Eighth Circuit,* } ss :

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit<sup>s</sup>  
Court of Appeals, Eighth  
Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this twenty-seventh day of November, A. D. 1897.

JOHN D. JORDAN,

*Clerk of the United States Circuit Court of  
Appeals for the Eighth Circuit.*

107

(Citation.)

And on the twenty-sixth day of November, A. D. 1897, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the acceptance of service endorsed thereon, is hereto attached and herewith returned.

108 UNITED STATES OF AMERICA, ss :

To the United States National Bank of New York, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's

office of the United States circuit court of appeals for the eighth circuit, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this tenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

DAVID J. BREWER,  
*Associate Justice of the Supreme Court of the United States.*

[Endorsed:] No. 984. Sterling R. Cockrill, as receiver, etc., plaintiff in error, vs. United States National Bank. Citation. Filed Nov. 26, 1897. John D. Jordan, clerk.

The United States National Bank, defendant in error herein, hereby waives formal service of the within citation this 15th day of Nov., 1897.

W. C. RATCLIFFE,  
JOHN FLETCHER,  
*Att'ys for United States National Bank, Defendant in Error.*

109 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred and eight pages contain full, true, and complete copies all of the pleadings, proceedings, and record entries in the case of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, plaintiff in error, vs. United States National Bank, defendant in error, No. 984, May term, 1897, as the same remain on file and of record in my office.

I do further certify that the original writ of error and the original citation are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-seventh day of November, A. D. 1897.

JOHN D. JORDAN,  
*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Endorsed on cover: Case No. 16,741. U. S. C. C. of appeals, 8th circuit. Term No., 206. Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, plaintiff in error, vs. The United States National Bank of New York. Filed December 9, 1897.

IN THE  
Supreme Court of the United States.

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COCKRILL, as Receiver of the First National Bank of  
Little Rock, Ark.,.....Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK OF NEW  
YORK,.....Defendant in Error.

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Brief for Plaintiff in Error on Motion to Dismiss.

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The United States National Bank obtained judgment against the receiver of the First National Bank of Little Rock, upon five notes of \$5,000 each, alleged to have been endorsed by the Little Rock bank before its failure. The judgment established the claim and directed that it "be allowed by said receiver to be by him paid in accordance with the act of Congress in that behalf provided." There was no service upon or judgment against the bank.

The judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The receiver, under instructions from the Comptroller of the Currency of the United States which were filed in this court, has sued out a writ of error to reverse the judgment.

The motion to dismiss raises the question whether the jurisdiction of the trial court depended solely on diverse citizenship. If it did not, the judgment of the Circuit Court of Appeals is subject to review here.

*Borgmeyer v. Idler*, 159 U. S., 408.

*Union Pacific Ry. v. Harris*, 158 U. S., 326.

Although the plaintiff in the trial court may have proceeded on the ground of diverse citizenship, if "another fact upon which jurisdiction could be predicated existed," this court will assume jurisdiction.

*U. P. Ry. v. Harris*, 158 U. S., *sup.*

The amount involved exceeds the jurisdictional limit, and the sole defendant is a receiver of a national bank appointed by the comptroller of the currency under the authority of the national bank act. The question therefore is whether a suit against the statutory receiver of a national bank, arises under the law of the United States.

The national bank act authorizes the comptroller of the currency to appoint a receiver to wind up the affairs of an insolvent national bank. It is the duty of the comptroller to make the appointment on becoming satisfied that the bank has refused to pay its circulating notes or has become insolvent. It is made the duty of the receiver to "proceed to close up such association" (Revised Stats., sec. 5234, as amended in 1876). The following sections of the revised statute<sup>s</sup> prescribe his functions and duties:

Section 5234. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of

record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary, to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Section 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspaper as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Section 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Under these provisions the receiver becomes an officer of the United States within the meaning of the third subdivision of section 629 of the Revised Statutes of the United States, and



as such can sue at law in the Federal courts without regard to citizenship or the amount involved.

*Price v. Abbott*, 17 Fed. R., 506, per Mr. Justice Gray.

Approved *in re Chetwood*, 165 U. S., 443.

*Gibson v. Peters*, 150 U. S., 342.

*Black's Dillon on Removal*, sec. 126 and cases cited.

If the receiver can sue in the Federal courts without regard to citizenship, he can be sued unless Congress has restricted the privilege, because as was ruled by this court through Chief Justice Marshall, in *Osborn v. U. S. Bank*, 9 Wheaton, 738, 825, the act of Congress authorizing him to sue "can only be sustained by the admission that his suit is a case arising under the law of the United States."

It follows that the numerous cases holding that a statutory receiver may sue in the Federal courts without regard to citizenship, all decide in effect that every such case arises under the law of the United States.

*Thompson v. Pool*, 70 Fed. R., 725.

"Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver."

*McNulta v. Lochridge*, 141 U. S., 327, 332.

*Texas and Pacific Ry. v. Cox*, 145 U. S., 593.

Actions against a statutory receiver of a national bank are therefore, actions to compel the comptroller of the currency, through the receiver who is only his agent, to pay out money which the act of Congress requires him to keep in the treasury of the United States to be by him disbursed ratably among the creditors of the bank. Every suit to establish a claim against the receiver involves the question whether the plaintiff is a creditor

of the bank within the meaning of the act of Congress and as such entitled to share in the distribution of the assets, which have been seized under authority of the act. Every such suit is an effort to control the official conduct of the receiver and to procure the application of funds in his official custody or in the treasury of the United States, to the satisfaction of a claim which the act of Congress requires the comptroller or the receiver to pass upon.

The receiver's "defense to every suit brought against him as receiver, is based upon the laws of the United States under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him."

Per Sanborn, C. J., in *Hot Springs School District v. First National Bank, etc.*, 61 Fed. Rep., 417.

"His defense must rest upon a just interpretation of the laws of the United States, for as he holds his office under national authority, his conduct must be regulated by the national laws. From the premises and upon principles supported by the highest authority, the conclusion necessarily follows that the suit is one of which a circuit court of the United States is invested with jurisdiction by the clause of the act giving jurisdiction of suits of a civil nature 'arising under \* \* \* the laws of the United States.' " Numerous authorities cited.

*Grant v. Spokane National Bank*, 47 Fed. Rep., 673.

The complaint in this case alleges that the plaintiff presented its claim to the receiver for allowance and that he refused to allow it. That is in effect a charge that the receiver has refused to perform a duty imposed upon him by the laws of the United States, towit, by section 5235 of the revised statutes.

*Bartley v. Hayden*, 74 Fed. Rep., 913.

Every suit against a corporation created by act of Congress, arises under the law of the United States.

*Pacific Railroad Removal Cases*, 115 U. S., 1.

For the same reason every suit against a receiver whose office is created by Federal authority arises under the same law.

Suits by or against receivers appointed by the circuit court of the United States in cases depending for jurisdiction on diverse citizenship only, arise "under the constitution and laws of the United States, in that the receivers were appointed by the circuit court, and derived their powers from and discharged their duties subject to those orders."

*Rouse v. Hornsby*, 161 U. S., 588.

*St. Louis, Ark. & Texas Ry. v. Trigg*, 63 Ark., 536.

*Black's Dillon on Removal*, sec. 125.

"Although a receiver of an insolvent national bank is appointed by the comptroller of the currency, pursuant to an act of Congress, rather than by a court, yet he clearly derives his official authority and rights from the laws of the United States. Consequently it is held that the Federal courts will have jurisdiction of an action brought by such a receiver to collect the assets of the bank, without regard to the citizenship of the parties, because the suit is one arising under the laws of the United States."

*Black's Dillon Removal*, sec. 126.

Commenting upon the rule that every suit against a corporation created by Congress, arises under the law of the United States, the chief justice in *Texas and Pacific Railway v. Cox*, 145 U. S., 593, said:

“The reasoning was that this must be so since the company derived its powers, functions and duties from those acts, and suits against it necessarily involve the exercise of those powers, functions and duties as an original ingredient.”

A receiver appointed by the comptroller of the currency, derives his powers and functions from, and discharges his duties subject to, Federal authority, as much as does a receiver appointed by a Federal court, or a corporation created by a Federal statute.

As the receiver is an officer of the United States, a suit against him in his official capacity arises under the laws of the United States.

*Bock v. Perkins*, 139 U. S., 628.

*In re Neagle*, 135 U. S., 1.

*Feibleman v. Packard*, 109 U. S., 421.

*Tennessee v. Davis*, 100 U. S., 257.

The jurisdiction of the court in a suit against a receiver or other officer does not depend on the defense the officer will set up.

Cases *supra*.

*Texas and Pacific Railway v. Cox*, 145 U. S., 593.

*Osborn v. U. S. Bank*, 9 Wheat., 738, 824.

These cases appear to be decisive of the motion.

It has been argued that the receiver of a national bank stands in the shoes of the bank; and that as a national bank cannot sue or be sued, without regard to citizenship, the receiver cannot. But jurisdiction as to the receiver is not necessarily dependent upon jurisdiction as to the bank. While the constitutional power of Congress to grant jurisdiction over the receiver comes through the power to create the bank, it is within

the discretion of Congress to declare in what cases the Federal courts shall have jurisdiction over the one or the other, or over both or neither.

The national bank act authorized a national bank to be sued in the Federal courts in the district where the bank was situated without regard to citizenship. There was no express provision authorizing the receiver to sue or to be sued, but the nature of his duties, together with section 59 of the act, clearly implied that he was authorized to sue and be sued in the Federal courts. Section 59 directs "That all suits and proceedings arising out of the provisions of this act in which the United States, or its officers, or its agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury."

In *Kennedy v. Gibson*, 8 Wallace, 498, after quoting the preceding section, the court said: "Considering this section, in connection with the succeeding section (the section authorizing the bank to sue and be sued), the implication is clear that receivers also may sue in the courts of the United States by virtue of the act without reference to the locality of their personal citizenship."

The receiver's right to sue was predicated upon his functions as an officer of the United States and not because he stood in the shoes of the bank.

Thus the law remained until 1882, when it was enacted by the fourth section of the act of July 12, that a national bank could not sue or be sued in the Federal courts without regard to citizenship. The status of the jurisdiction as to the receiver was not mentioned in the latter act. The first case in which the

jurisdiction as to the receiver of a national bank was decided after the act of 1882, was before Mr. Justice Gray on the circuit, in *Price v. Abbott*, 17 Fed. Rep., *sup.* He decided that suits by or against a statutory receiver of a national bank, are not suits brought by or against a national bank, but by or against an officer of the United States, and that the act of 1882 did not impair the Federal courts' jurisdiction over such receivers. That settled the law upon that subject, and the circuit courts, without exception, continued to sustain the jurisdiction of suits at law and in equity by and against statutory receivers of national banks.

The next change in the law was by the fourth section of the act of March 3, 1887, where it was provided that for the purpose of jurisdiction, national banks should be regarded as citizens of the States in which they were situated. It contained, however, the following provision: "The provisions of this section shall not be held to apply to the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or *cases for winding up the affairs of any such bank.*"

24 Statutes at large, 554.

In *Armstrong v. Trautman*, 36 Fed. Rep., 275, Judge Jackson ruled that prior to the act of 1887, it was settled that the Federal courts had jurisdiction of suits by receivers, and that the provision above quoted expressly preserved that jurisdiction. This decision was followed in numerous cases by the circuit courts.

Black's Dillon on Removal, sec. 126 and note.

*Linn County National Bank v. Crawford*, 69 Fed. Rep., 532.

After this legislation, came the decision of this court in *Gibson v. Peters*, 150 U. S., *sup.*, affirming in effect the correctness of the decisions on the circuit before referred to. It was an action by a United States district attorney against the statutory receiver of a national bank, to recover for legal services alleged to have been rendered the receiver. The plaintiff, the defendant and the bank, were all citizens of Virginia. This court entertained jurisdiction of the cause without question, and adjudged that a suit brought by the receiver against a debtor of the bank "was one arising out of the provisions of the act of Congress governing such (banking) associations." The case determines therefore in effect, that every suit by or against a statutory receiver of a national bank arises under the laws of the United States. It is the decision of this court on the very question presented by the motion to dismiss.

## II.

The complaint by fair intendment alleges that the receiver was appointed by the Comptroller of the Currency of the United States.

It alleges that the First National Bank of Little Rock, was a corporation created under the laws of the United States; that it became insolvent; that the defendant was appointed receiver of said bank; that the plaintiff had presented its claim to the receiver for allowance, and that he had rejected it.

Whenever a national bank becomes insolvent, it is the comptroller's duty forthwith to appoint a receiver. The law presumes that every official does his duty. It is alleged that a

national bank became insolvent and that a receiver was appointed. It will be presumed that the appointment was by the comptroller.

It is alleged that the plaintiff presented his claim to the receiver for allowance. Section 5235 U. S. Rev. Statutes and the practice established in the comptroller's office, require claims to be presented to the receiver for allowance before suit. "Creditors must seek their remedy through the comptroller in the mode prescribed by the act of Congress."

*Bank v. Pahquioque Bank*, 14 Wal., 383, 401.

No other receiver is known to the law to whom a creditor is required to present his claim for allowance before he is authorized to sue on it. Hence it will not be presumed in favor of the pleader, that the receiver described in the complaint was not appointed in accordance with the procedure which the pleader alleges the plaintiff conformed to—that is the act of Congress.

For the purpose of jurisdiction in this court, it is only necessary that jurisdiction of the circuit court did not depend entirely upon diverse citizenship when the suit was commenced—that is, it is to that point of time simply that the enquiry is referred.

*Borgmeyer v. Idler*, 159 U. S., 408, 414.

A different question from diverse citizenship always inheres in this class of cases "as an original ingredient" (*Texas & Pacific Railway v. Cox*, 145 U. S., 593), and the plaintiff will not be permitted to defeat the defendant's right of removal or appeal by neglect, whether unintentional or willful, to allege the source of the receiver's appointment. This case is analogous to that of the *Texas and Pacific Railway v. Barrett*, 166 U. S., 617, where the plaintiff, suing a Federal corporation, alleged simply that it was "a railway corporation, duly incorporated." The



court looked further into the record and ascertained that it was incorporated by Congress, and so held the defendant's petition for removal good.

In *Texas and Pacific Ry. v. Cody*, 166 U. S., 606, the plaintiff, a citizen of Texas, sued the Texas and Pacific Railway, in a State court, and in order to prevent a removal, alleged that the defendant was a "corporation created and existing under the laws of Texas." As State railway corporations are created under general laws, the court could not know judicially that the allegation of the complaint as to the source of the defendant's incorporation, was false. But the court ascertained from other parts of the record that that particular railway was incorporated by Congress, and the subterfuge resorted to by the plaintiff went for naught.

If anything is required to make plain the meaning of the allegations of the complaint in this case in regard to the appointment of the receiver, the court need look only to the plaintiff's judgment of recovery, quoted in the early part of this brief, to ascertain that the receiver holds his office in pursuance of the statutes of the United States. The last order in the cause is as follows:

"It appearing that said Cockrill (the defendant) is receiver by virtue of appointment of the comptroller of the currency in accordance with the act of Congress, it is ordered that he prosecute his writ of error without bond."

A similar order was entered here when the writ of error was allowed, in accordance with *Pacific National Bank v. Mixer*, 114 U. S., 463.

But if the receiver had been appointed by a Federal court to wind up its affairs as an insolvent corporation, the jurisdic-

tion in that case would arise under the laws of the United States (*California Bank v. Kennedy*, 167 U. S., 362), and the suit against the receiver in this case would arise under the same law.

*Rouse v. Hornsby*, 161 U. S., *sup.*

If appointed by a State court, the complaint in this case stated no cause of action within the jurisdiction of the Federal court, for "no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court appointing him."

*Porter v. Sabin*, 149 U. S., 473, 479.

It was not alleged that permission to sue the receiver had been granted by any court. This court will not presume that the plaintiff was proceeding in contempt of court.

No court could maintain jurisdiction of the assets of the bank after the appointment of a receiver by the comptroller.

*National Bank v. Colby*, 21 Wal., 609.

It is respectfully submitted that the motion should be denied.

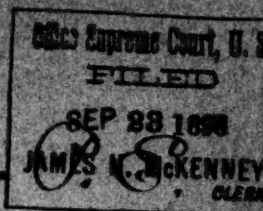
STERLING R. COCKRILL,

*Attorney for Plaintiff in Error.*



40.206.

By. of Cockrill for



Filed Sept 23, 1898.

IN THE

# Supreme Court of the United States.

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H. F. AUTEN, as Receiver of the First National Bank,  
of Little Rock, Ark. .... Plaintiff in Error.

v.

UNITED STATES NATIONAL BANK, Defendant in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

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STERLING R. COCKRILL,

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## BRIEF FOR PLAINTIFF IN ERROR.

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**A brief has been filed heretofore on behalf of the plaintiff in error on the motion to dismiss the writ of error.**

**The facts upon the merits are set out herein in connection with the particular point discussed.**

### **GENERAL STATEMENT.**

The United States National Bank sued the receiver of the First National Bank of Little Rock, Ark., to recover upon the alleged indorsement of the latter bank upon five promissory notes of \$5,000 each. Three of the notes were executed on December 7, 1892, by the City Electric Street Railway to Geo. R. Brown and H. G. Allis, payable four months after date. They purported to be indorsed by Brown, Allis and the First National Bank by Allis as president, in the order named.

The other notes were executed on the same day by the McCarthy & Joyce Co. to James Joyce, and were payable four and five months, respectively, after date. They purported to be indorsed by James Joyce, H. G. Allis, and the First National Bank by Allis as president (Tr., pp. 9, 10).

The complaint alleged that the notes belonged to the First National Bank, and that the United States Bank discounted them for it before maturity in the usual course of business.

The receiver's answer denied that either of the notes was ever the property of the Arkansas bank, or was ever delivered to it; denied that the Arkansas bank indorsed either of the notes, or delivered them to the plaintiff; denied that the plaintiff bank acquired the notes in the usual course of business, and denied that plaintiff was an innocent holder of either of the notes (Tr., pp. 4, 6, 7).

At the trial it was proved that none of the notes appeared upon the books of the Arkansas bank, or was ever owned by it; that they were executed for the accommodation of H. G. Allis, who was the president of the Arkansas bank; that he indorsed the notes personally, then indorsed the name of the Arkansas bank upon them by himself as president for his own accommodation, and inclosed them in a letter to the United States National Bank, with a request that it discount them and place the proceeds to the credit of the Arkansas bank. The letter was signed "H. G. Allis, P't." The United States Bank discounted the notes on December 16, 1892—nearly four and five months before the notes matured—and notified the Arkansas bank by telegraph that it had credited proceeds of discounted notes to its account. That was in pursuance of Allis's direction to the United



States Bank. As soon as the notice of the credit was received, Allis caused his account to be credited with the full amount of the proceeds of these notes, as so much cash placed by him to the credit of the Arkansas bank, with the United States Bank. Allis withdrew the money from the Arkansas bank and was thereafter continuously largely indebted to it.

Allis had no special authority from the board of directors to borrow money for the bank, or to indorse or discount its paper. *It was not proved that he had ever before indorsed any of the bank's paper*, or that any director or other officer of the bank knew that he had indorsed the bank's name upon the notes in suit, until it suspended business. The jury was at liberty to find from the evidence that the officers of the Arkansas bank supposed that Allis had discounted his own notes with the United States Bank, and caused the proceeds to be placed to the credit of the Arkansas bank as a convenient method of transmitting the funds. Other details of the evidence will be referred to further on.

The court directed a verdict for the plaintiff, and the judgment was affirmed in the circuit court of appeals.

### ASSIGNMENTS OF ERROR.

The court of appeals erred in holding that there was no error in directing a verdict for the defendant in error, and in holding that the trial court committed no error in refusing to charge the jury as requested by the plaintiff in error in each of the following requests, viz:

"1. The defendant in its answer denies the liability of the First National Bank, because he says that the notes sued on

were never the property of the bank, never were upon the books of the bank; that they had never been discounted by the defendant bank; that their execution and discount by the plaintiff bank was a scheme or plan adopted by H. G. Allis to obtain money for his own use and benefit, and that the defendant bank never received any benefit whatever from the transaction.

“2. These defenses would be an absolute bar to recovery by the plaintiff, and your verdict should be for the defendant, unless it shall appear that the plaintiff acted in good faith in the transaction and had no notice, express or implied, of the fraudulent character of the transaction, or want of power or authority in Allis to bind the bank by his indorsement as president, and the procuring the discount of the notes by the plaintiff bank.

“3. In determining whether Allis had authority to discount the notes for the bank, you are instructed that the mere fact that he was president of the bank did not authorize him to do so. The president of a national bank has no authority by virtue of his office simply to bind the bank by indorsement of its name.

“4. Before you find that he had implied authority by reason of the acquiescence of the directors of the defendant bank, you must find that the directors knew that he exercised such authority, or that he had been permitted, without their knowledge, to rediscount notes through a series of transactions such as would amount to a custom to do so, or else that the directors had knowledge that Allis carried on, or negligently permitted him to carry on, such a course of dealing with the plaintiff bank as to induce it to believe that they had conferred the power upon him to indorse or discount notes.

"5. If the plaintiff bank received and discounted these notes under circumstances which were so much out of the course of ordinary and legitimate banking business as to require it to see to it that the agent or officer claiming to act for the defendant bank had special authority so to act, you should find for the defendant.

"6. The borrowing of money by a national bank is so much out of the course of ordinary banking business as to require those making the loans to see to it that the officer or agent making the loan had special authority to borrow money.

"7. The jury are instructed that the president of a national bank has not authority to raise money by discounting the bank's notes without special authority from the board of directors. If, therefore, you find that the notes in suit were discounted by H. G. Allis without special authority of the board of directors, you will find for the defendant, unless you further find from the preponderance of the evidence that the defendant bank received the proceeds of the notes discounted.

"8. Rediscounting paper actually owned by the bank is to all intents and purposes borrowing money by the bank obtaining the discount, where the paper rediscounted is indorsed by the bank obtaining the rediscount in such a manner as to permit recourse upon the indorsing bank, as in this case.

"9. If the jury finds that it was the course of dealing between the plaintiff bank and the First National Bank that notes were rediscounted by the former for the latter upon the credit and indorsement of the latter bank; that the former demanded that the latter should maintain with it a deposit to its credit sufficient to cover its liability upon the rediscounted notes as they

severally matured, and that a credit balance satisfactory to the plaintiff was maintained with it by the First National Bank; that the rediscounted notes were charged upon its books by the plaintiff bank to the First National Bank, as they matured, and then sent to the First National Bank in order to allow it to collect from the makers and prior indorsers for its own benefit, the transaction was a simple borrowing and lending of money; and if the jury finds that the notes in suit were discounted by the plaintiff bank in accordance with such course of dealing, they will find for the defendant, unless they find that the First National Bank received the proceeds of such discount, or that Allis was authorized by the First National Bank to make the discount for it.

“10. The jury are instructed that the business of a national bank is to lend money, not to borrow it; to discount the notes of others, not to get its own notes discounted. If, therefore, you find that the plaintiff discounted the notes in suit, believing that they had been sent to it by an officer of the defendant bank for the purpose of raising money for the bank, then the transaction was so much out of the course of ordinary banking as to require the plaintiff to ascertain that the officer acting for the defendant bank had authority to raise money on the notes for the bank; and if you find that the plaintiff discounted the notes without making inquiry as to the officer's authority, and further, find that the officer sending the notes for discount had no special authority to raise money thereon, you must find for the defendant, unless you further find that the defendant bank received the proceeds of the notes.

“11. The jury are instructed that the business of a bank is to lend, not to borrow money; to discount the notes of others, not

to get its own notes discounted. The fact, therefore, that the officers of a national bank make application to another national bank to discount or raise money upon notes is a circumstance which may be considered by them in connection with the other facts and circumstances to determine whether the plaintiff acquired the notes in due course of business.

“12. If the jury finds that it is proved that H. G. Allis was in the habit of superintending the issuing of the defendant bank's paper, that would not justify the plaintiff in relying upon his having authority to issue the notes in suit, unless the evidence shows that the plaintiff knew that the defendant had previously acquiesced in such conduct on Allis's part.”

“13. If the jury finds that H. G. Allis was the payee or one of the payees in either of the notes in suit; that he indorsed the same in blank; that he then indorsed the name of the First National Bank immediately under his indorsement by himself as its president, in such manner as to show it was done by him; that he himself transmitted said notes to the plaintiff bank in a letter signed by him as president, and procured the plaintiff bank to discount said notes, your verdict should be for the defendant as to said notes, if you find that Allis made the indorsement of the bank's name for his personal benefit without authority from the bank, unless you further find that the defendant bank ratified the action of Allis in discounting the notes.

“14. If you find that Allis indorsed the name of the First National Bank upon the notes in suit for his own benefit without authority from the First National Bank, and that the plaintiff knew that fact, your verdict should be for the defendant. The

form of the notes in which Allis is payee and indorser was sufficient to carry notice to the plaintiff bank that he was using the First National Bank's name for his personal benefit, if you find that these notes were delivered to the plaintiff bank for discount by Allis, although he professed to act as president of the First National Bank and for its benefit in requesting the discount.

"15. If you find that a part of the notes in suit were transmitted by Allis to the plaintiff with notes in which he was payee and last prior indorser, and that all said notes show that the name of the First National Bank was indorsed thereon by Allis, you are at liberty to take those facts into consideration in determining whether the plaintiff knew that Allis was using the name of the First National Bank for his benefit.

"16. The jury are instructed that, however they may find the facts upon other issues, the receiver is entitled to recover of the plaintiff the amount of \$467.86, and they are directed to return a verdict for the receiver in that amount" (Tr., pp. 65-69).

All exceptions were properly saved and each ruling of the court was separately assigned as error (Tr., pp. 78-82).

### **BRIEF AND ARGUMENT.**

It is certain there could be no recovery upon the notes by one who had knowledge of the facts above detailed. The United States Bank is in no better position than one having knowledge of the facts if it did not acquire the notes in the usual course of business. If the facts detailed constitute "borrowing money" the transaction was out of the ordinary course of banking and the lending bank was bound to take notice that Allis had no authority to bind the Arkansas bank.

**Borrowing money is out of the usual course of a legitimate banking business, and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so.**

Western National Bank *v.* Armstrong, 152 U. S., 346.

Chemical Nat. Bank *v.* Armstrong, 13 C. C. A., 47;

S. C., 65 Fed. Rep., 573.

Blanchard *v.* Bank, 21 C. C. A., 319, 323; S. C., 75

Fed. Rep., 249.

United States National Bank *v.* First National Bank of Little Rock, 79 Fed. Rep., 296, 300.

National Bank *v.* Atkinson, 55 Fed. Rep., 465.

Adams *v.* Cook National Bank, partially reported in Ball on National Banks, p. 54.

The act of Congress prescribes that "the affairs of each (banking) association shall be managed by not less than five directors" (Rev. Stat., sec. 5145).

The execution of the daily routine duties of the banking business may be delegated by the directors to agents or officers. The performance of such duties is not the *management* of affairs which is specially devolved upon the board of directors by the bank's charter.

1 Morse, Banking, sec. 116.

There are functions requiring the exercise of judgment and discretion which the directors cannot delegate at all. As to such functions the directors can use the officers of the bank only as the instruments for carrying out their designs after they have acted.



If the directors leave "to the discretion of others the decision of weighty matters covering a wide ground of responsibility, they (that) would amount to an effort in a measure to delegate the 'management' of the business of the bank. To this extent the board of directors cannot go."

1 Morse, Banking, secs. 116-119.

"Thus the making of discounts is *an inalienable function of the directors.*\* They cannot part with it or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be subdelegated. *The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skillful conduct of which the prosperity of the institution and the safety of persons dealing with it depend.* This duty they cannot shift in whole or in part upon others."

1 Morse, Banking, sec. 117.

See *ex parte* Winson, 3 Story, 411, 425.

Silver Hook Road v. Greene, 12 R. L., 164.

That borrowing is one of the functions which the directors cannot shift from themselves, is settled by the decision of *Western National Bank v. Armstrong*, 152 U. S., *sup.*

That was a case in equity. The facts were disputed. The Western National Bank, of New York, contended that the evidence showed that it had loaned to the Fidelity National Bank, of Ohio, the sum of \$207,290. The receiver of the ~~Western~~ *Fidelity*

\**Bank U. S. v. Dunn*, 6 Pet. 51; *Percy v. Milandon*, 8 Martin (N. S. La.), 68; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

National contended that the money had been advanced to E. S. Harper individually, who at the time was the principal executive officer of the Ohio bank. The case was determined by the supreme court upon the theory of the first state of facts—that is, that the officers of the New York bank had been led to believe by Harper, the acting president and principal executive officer of the Ohio bank, that he was acting for and on behalf of his bank in procuring the money; and that the New York bank placed the money to the credit of the Ohio bank under the belief that the loan was made to it. The court said:

“It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. \* \* \*

The most that can be claimed in this case is, that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months’ time.

“It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. Stat., 5136, par. 7).

“The power to borrow money or to give notes is not expressly given by the act. *The business of the bank is to lend,*

*not to borrow money; to discount the notes of others; not to get its own notes discounted. \* \* \**

*“Nor do we doubt that a bank in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.*

*“Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.*

*“Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown.”*

The language of the court is plain, and is applicable to the facts of this case. See Judge Sage's interpretation of the case in *National Bank v. Atkinson*, 55 Fed. Rep., 465. It has been construed by other courts to be applicable even to the case of money borrowed by the cashier in the name of his bank. In *Chemical National Bank v. Armstrong*, 65 Fed. Rep., 573, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, said: *“It was held (in Bank v. Armstrong, sup.), that the borrowing of money by a bank, though not illegal, is so*

much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money, and that where no such special authority appears, and no ratification of the authorized act is shown, the bank is not liable." The opinion, after quoting some State decisions holding that a cashier of a bank has implied authority to borrow for his bank, proceeds: "The effect of the decision in *Bank v. Armstrong* is to make the above rule as to the authority of a cashier to borrow money for the bank, inapplicable to national banks." The case received the same construction in the Circuit Court of Appeals for the Ninth Circuit, where the power of the cashier was involved.

*Blanchard v. Chemical National Bank of Tacoma*, 75  
Fed. Rep., *sup.*

It follows that no officer can bind the bank by borrowing in its name without special authority from the board of directors. Those who deal with the officer or agent know that he can act only in pursuance of a special limited authority, and they must take notice, therefore, of the limitations upon his power, and are charged with notice of his want of power when it is in fact lacking. They deal with him at their peril.

*Meecham's Agency*, secs. 291, 285.

The learned court below conceded the law to be as stated above, but sought to evade its effect by declaring that discounting or rediscounting the commercial paper of others (although indorsed by the bank obtaining the discount) is a purchase of the paper and not a loan upon the faith of it, and therefore does not

come within the meaning of the *Western National Bank v. Armstrong*, *supra*.

*U. S. Nat. Bank v. First Nat. Bank*, 79 Fed. Rep., 296.

We submit that the distinction attempted to be made, is not sustained **either** by authority, or by the common understanding or custom of bankers, **or** by the proof of the transaction in this case.

**In the business of banking, rediscounting commercial paper is only a method of borrowing money.**

*Fleckner v. U. S. Bank*, 8 Wheat., 338.

*National Bank v. Johnson*, 104 U. S., 277.

*Merchants Nat. Bank v. Sevier*, 14 Fed. Rep., 662.

*People v. Utica Ins. Co.*, 15 Johns, 358, 392.

*City Bank v. Bruce*, 17 N. Y., 507, 515.

*Smith v. Exchange Nat. Bank*, 26 Ohio St., 141, 151.

*Prescott Bank v. Butler*, 157 Mass., 548, 550.

*Freeman v. Brittin*, 2 Harr. (N. J.), 191, 206, 207.

209, 211.

*Lazear v. Nat. Bank*, 52 Md., 78, 129.

*Wecklar v. Bank*, 42 Md., 581, 592.

*First Nat. Bank v. Sherborne*, 14 Ill. Ap., 566, 570.

*State v. Boatman's Sav. Inst.*, 48 Mo., 189.

*Bank v. Baldwin*, 23 Minn., 198.

*Pape v. Capital Bank*, 20 Kan., 440, 446, 447, 450,  
451.

*McLean v. Lafayette Bank*, 3 McLean, 587, 599.

*Rodecker v. Littaner*, 8 C. C. A., 320.

Discount is defined as follows:

"Interest reserved from the amount lent at the time of making a loan." Bouvier's Law Dictionary, title Discount.

"Payment in advance of interest upon money loaned." Webster's Dictionary, title Discount.

"In banking. A charge made at a certain rate per cent for the interest of money advanced on a bill or note or other document due at some future time. This charge, the discount of the bill, etc., deducts from the amount of the bill, handing over the balance to *the borrower*."

Encyclopaedic Dictionary, title Discount.

Discounting and rediscounting have a fixed legal meaning.

"Nothing can be clearer," says Judge Story, "than that by the language of the commercial world, and the settled practice of the banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon the advance or *loan of money* on negotiable paper, or other evidence of debt, payable at a future day, which are transferred to the bank. We must suppose that the legislature used the language in this, its appropriate sense."

Fleckner v. Bank U. S., 8 Wheat., 338.

In National Bank v. Johnson, 104 U. S., 271, this court said that in the national bank act "the terms loans and discounts are synonymous."

"The discounting of notes," said Spencer, J., in People v. Utica Insurance Company, 15 Johns, 358, 392, "is one mode of lending money."

"In the business of banking the \* \* \* discounting of paper is only a mode of loaning money."

Smith v. Exchange Nat. Bank, 26 Ohio St., 141, 151.

“It is not necessary in order to constitute a loan, that there should be in very terms an application to borrow or an agreement to lend. Every advancement of money for the accommodation of another, to be repaid to the person making the advance, by the person receiving it or by any person for him, or by or out of his funds, is literally and legally a loan of money.

Byrne v. Kennifeck, 1 Batty's Rep., 273.

Fireday v. Wightwick, 1 Tonelyn's Rep., 250.

“Whoever, therefore, gets a bill or note discounted at bank or by an individual, gets a *loan*. He literally borrows money.  
\* \* \* In short, the position that an ordinary discount of a note or bill is not a *loan* of money, is contradicted, not only by the common sense of the community, but by innumerable cases in England and in this country, in which discounts have been held to be *usurious*, which all admit they could not be unless they involved a loan of money.”

Freeman v. Brittin, 2 Harr. (N. J.), 191, 206, 207,  
209, 211.

“There is a difference between buying a bill and discounting it. The former word is used when the seller does not indorse the bill and is not accountable for its payment.”

Bouvier, title Discount, and cases *supra*.

If it were true as held by the court below that the defendant in error was a purchaser and not a lender in the transaction under investigation, then the transaction was *ultra vires*, because a national bank cannot engage in a note broker's business (First Nat. Bank v. Nat. Exchange Bank, 92 U. S., 122; Grow v. Cock-



rill, as receiver, 63 Ark., 418); and the United States Bank could not recover upon these notes upon the theory that it was an innocent purchaser.

Farmers, etc., Bank v. Baldwin, 23 Minn., 198.

Lazear v. Nat. Bank, 52 Md., 82.

Ridgway v. Nat. Bank, 62 Ky., 216.

Prescott Bank v. Butler, 157 Mass., 548.

**The evidence shows that both banks treated the transaction as a loan of money.**

Aside from the legal definition of the terms loan and discount, the proof in this case shows that both banks treated the series of transactions of which the discount of the notes in suit was a part, as loans of money, and it was therefore error for the court to take the case from the jury upon the assumption that there was no evidence of a loan.

Every officer of the United States National Bank who testified in the cause *expressly denied that his bank had purchased any notes from the Arkansas bank*; and these witnesses are borne out by the evidence of the transactions. In the correspondence between the two banks, they speak of the *rate of interest* to govern their transactions (Tr., pp. 16, 11, 18, 20, 26); the United States Bank wrote to the Arkansas bank, "make your loan on us as light as possible, borrowing only what you are bound to have, but we will take care of you and give this loan as requested" (Tr., p. 28); the United States Bank refused to discount notes unless the Arkansas bank would indorse them (Tr., pp. 15 and 18); the money was advanced upon the credit of the

Arkansas bank (Tr., p. 14); the other parties to the notes were not even looked to for payment by the defendant in error, for its officers say that Allis, who was a party to some of the notes, was never indebted to their bank in any sum whatever (Tr., p. 14); and *the Arkansas bank was required to have funds with the defendant in error to cover its paper as it matured* (Tr., pp. 33, 34, and 37); and *the matured notes were treated as drafts or checks upon the Arkansas bank's account and charged accordingly* (Tr., p. 36, exhibit 54, and exhibit 77, p. 44).

In exhibit 54 to the deposition of the cashier of the United States Bank, the latter says to the Arkansas bank, "your account has been frequently *overdrawn* by collection of your bills discounted," etc. Exhibit 77 shows that every discounted note was charged to the Arkansas bank at maturity, without an effort to collect from the makers and without awaiting returns from Little Rock. In two-thirds of the instances the balance to the credit of the Arkansas bank on the books of the United States Bank, was sufficient to cover the charges. In other instances the account remained in overdraft. That was the usual course of business between the banks. The notes in suit were discounted in accordance with that custom, that is, upon the agreement that the notes were to be paid by the Arkansas bank out of its funds on deposit in the United States Bank.

See Assignment of Error No. 9.

This evidence at least tends to show every element that goes to make a loan of money as distinguished from a sale. It shows an advance of money at an agreed rate of interest upon the

credit of the Arkansas bank, the obligations for which were renewed (Tr., pp. 24 and 28) when not paid in the usual course of business. That of itself was enough to constitute a loan. The term interest relates only to a loan, "for interest is predicable only of loans, being the price paid for the use of money."

Nat. Bank v. Johnson, 104 U. S., 276, 277.

But the proof goes further and shows that the Arkansas bank was looked to as the party primarily liable for the repayment of the money, and that it was payable out of its funds on deposit with the United States Bank. When the discounted notes matured they were charged to the Arkansas bank's account just as in any other form of loan. In accordance with an understanding between the banks to that effect, the notes in suit were charged by the United States Bank to the account of the Arkansas bank, and cash standing to the latter's credit on the books of the former was appropriated to their payment after the appointment of the receiver for the Arkansas bank. Other notes which had been regularly discounted by the United States Bank for the Arkansas bank had been paid in the same way, and the United States Bank evidently treated the last transaction exactly as it had done the others.

The proof in the case, in addition to the above, is that bankers regard rediscounting as borrowing (Tr., pp. 47, 51). It is difficult to see how they could regard it in any other light (see *Bank v. Armstrong*, 76 Fed. Rep., 339, 341, 344). The construction placed by the bankers of the United States upon the decision in *Western National Bank v. Armstrong*, 152 U. S., 346, is that it applies to rediscounts as well as to other kinds of

loans. That is shown by the unquestioned evidence of Davis, the cashier of the largest national bank in Arkansas, a witness for the defendant in error. He said that since that decision it was the custom of banks generally to require of an officer who offers to rediscount paper for his bank, evidence of special authority from the board of directors to do so; that the banks in New York City and in other money centers sent out circulars to their correspondents elsewhere to that effect.

That it is equivalent to saying what the courts have repeatedly asserted, that in the business of banking, discounting is only a method of borrowing money; that borrowing in any form is unusual business in banking, and that no officer has power to bind his bank therefor without special authority.

If there were otherwise a doubt as to the meaning of *Western National Bank v. Armstrong*, this practical construction placed upon it by the vast body of intelligent men whose business is directly affected by it, should turn the scale. That construction of the decision not only does not interfere with the transaction of their business (Tr., p. 51), but is a protection to those who invest their capital in banks or trust their earnings upon deposit with them.

If that is not the meaning of *Western National Bank v. Armstrong*, the decision is merely *brutum fulmen*, and for all practical purposes might as well have been decided the other way; for the so-called rediscount furnishes a ready subterfuge to evade the law, and will leave the decision without operation in the business of banking. In that event borrowing will continue to be the ordinary business of banking by the Napoleons of

finance, and the confiding public who put their money in banks or in bank securities will continue to be robbed. The enforcement of the practice pointed out in the opinion cuts off the most fruitful source of bank-wrecking.

The form of the contract by which the borrower promises to repay is immaterial, whether it be the conditional promise of the indorser, or the absolute promise of a maker or guarantor. The bank's credit is as fully pledged in one case as in the other; but the case of the *Western National Bank v. Armstrong*, 152 U. S., *supra*, decides that it is not the province of a bank to pledge its credit to borrow money.

*Mussey v. Eagle Bank*, 9 Met., 306, 314, is authority in point. Speaking of rediscounting, the court said the practice "would confer the power on a single officer to pledge the credit of the bank by the mere writing of his name—a power never contemplated by the legislature, nor intended to be conferred by the stockholders."

See *Aetna National Bank v. Charter Oak Ins. Co.*, 50 Conn., 167.

*Lamb v. Cecil*, 28 W. Va., 653.

If the lower court was right in its rulings upon the questions argued above, still it is submitted that the judgment is wrong because Allis had no power, apparent or real, to bind the Arkansas bank by the indorsement or discount of the notes; and because the form of the notes in Allis's hands carried notice that he was using the bank's name for his own accommodation.

**The president of a national bank has no authority by virtue of his office to indorse or discount its notes.**

The act of Congress, under which national banks are organized, vests the management of the bank's affairs in a board of directors. It authorizes the board to delegate the ministerial and routine duties of banking to "duly authorized officers or agents" (Rev. Stat., sec. 5136, par. 7).

No greater powers than those ordinarily possessed by the corresponding officers of like corporations can be presumed to exist in the officers of a national bank. The act of Congress does not enlarge their powers. The only power expressly conferred by Congress on the president of a national bank is that of presiding at the meetings of the board (Rev. Stat., sec. 5150). Unless, therefore, the records of the bank show that the duties of the president have been otherwise defined by the directors, he must be treated as having no greater powers than are ordinarily incident to the office of president.

*Hodges v. Bank*, 22 Gratt., 51.

"Until it is shown that some officer or agent of the bank was duly authorized to take charge of this branch of the association, the presumption is it was the duty of the board of directors."

*U. S. v. Britton*, 108 U. S., 198.

"The whole business of the bank is confided entirely to the directors; and of course with them it would rest to fix the duties of the cashier or other officers."

*Fleckner v. Bank of U. S.*, 8 Wheat., 357.

There was no proof whatever that the board of directors had ever defined the duties of the president, or expressly conferred any power upon him. It is incumbent, therefore, to ascertain what power attaches to the office of president by implication of law.

“Where a charter gives to a board of directors the management of the affairs of the corporation, the president and cashier cannot, without authority from the board, assign choses in action, except when due in the usual course of business.”

Angel & Ames, Corporations, sec. 299.

“In the absence of anything in the act of corporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are in the exclusive control of their directors, from whom authority to dispose of their assets must be derived.”

Titus v. Railway, 37 N. J. L., 98.

Morris v. Griffith Wedge Co., 69 Fed. Rep., 131.

“The president of a bank is not the executive officer who has charge of its moneyed operations.”

1 Daniel, Neg. Instruments, sec. 393.

“The president of a national bank has no power inherent in his office to bind the bank by the execution of a note in its name.”

National Bank of Commerce v. Atkinson, 55 Fed. Rep., 465.

“The president of a bank has no authority to transfer its commercial paper.”



Hollowell v. Bank of Hamlin, 14 Mass., 178, 180.

Smith v. Lawson, 18 W. Va., 212, 228.

Gibson v. Goldthwait, 7 Ala., 293.

“The inherent powers, *virtute officii*, of a president are very limited. From his mere official station, he has no more control over the corporate property and funds than any other director. *He cannot, without special authority, borrow money and bind the bank to repay it.*”

1 Boone, Banking, sec. 101.

1 Cook, Corporation Law, sec. 716.

“Unless authorized by the charter, or by a resolution of the board of directors, the president has no power to borrow money in the name of the company and pledge its responsibility, nor to assign its assets as security therefor.”

4 Thompson, Corporations, sec. 4644.

In *City Electric Street Railway v. First National Bank*, 62 Ark., 33; S. C., 34 S. W. R., 89, the Supreme Court of Arkansas says:

“Unless the authority is expressly conferred by the charter or given by the board of directors, it may be stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. They have no inherent power to execute notes in the name of the corporation. (Numerous authorities are cited.) Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law.”

The text-books and cases cited above refer to numerous authorities to the same effect. But it is useless to cite them, because *this court has taken the same view of the question under the national banking act.*

In *Putnam v. U. S.*, 162 U. S., 687, 713, the court says:

"There can be no doubt that the president of a national bank, *virtute officii*, has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president. Indeed, the statutes expressly provide that the powers of the president of a national bank may be defined by the board of directors." The court further says: "The power to draw the check did not inhere in the functions of the president."

If the president of a bank has not power to draw a check in the usual course of business, upon the funds of the bank of which he is president, it is because the powers inherent in his office are limited as stated in the authorities *supra*. He has, therefore, no power to transfer the paper of the bank or to bind it by indorsement.

Section 5209, United States Revised Statutes, recognizes that the power to assign or negotiate the notes of a national bank resides in the board of directors. It is as follows:

"Every president, director, cashier, teller, or agent of any association \* \* \* who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority \* \* \* assigns any note, bond, draft, bill of exchange, mortgage, judgment, or

decree \* \* \* with intent in either case to injure or defraud," etc., shall be guilty of a misdemeanor.

There is a similar statute in Arkansas, namely:

"Every president, cashier, secretary, or other officer, and every agent of any bank \* \* \* who shall willfully and designedly sign, with intent to issue, sell, or pledge \* \* \* any promissory note \* \* \* the signing, issuing, selling, or pledging of which by said president, cashier, treasurer, secretary, or other officer or agent, shall not be authorized by the charter and by-laws of such corporation, upon conviction thereof" shall be guilty of a felony. S. & H. Dig., sec. 1604.

This section applies to national as well as to State banks.

McClelland v. Chipman, 164 U. S., 347.

Nat. Bank v. Com., 9 Wall., 362.

It has been construed by the Supreme Court of Arkansas, and the construction placed upon it is of course as much a part of the act as though plainly expressed by the legislature. The court said:

"Our statute for the incorporation of business corporations expressly confers the management of their business affairs upon 'not less than three directors.' S. & H. Dig., secs. 1330, 1335. Another section makes it a felony for the president or secretary of a corporation to 'willfully and designedly sign, with intent to issue a promissory note without authority from the charter or by-laws of such corporation.' S. & H. Dig., sec. 1604. Surely the legislature would not have made it a felony for these officers to issue notes if they had such power *virtute officii*. From the above provision it appears that the president and secretary

are not general agents. Whatever power they have to act for the corporation in business matters must be delegated and special."

We submit therefore that it is settled, not only by the decisions before cited, but by the statutes quoted, that Allis had no power by virtue of his office to negotiate the notes of the bank.

**Allis was not held out to the public as having power to bind his bank by indorsement of commercial paper.**

As the power to bind the bank by indorsement did not inhere in the office of president, and no express authority to do so was shown, it devolved upon the plaintiff below to prove a custom or course of dealing sufficient to induce the jury to infer that the power had been granted by the directors. The burden of proof was upon the plaintiff to show that Allis "had exercised the power habitually with the knowledge of the directors," as was said in *Merchants Bank v. State Bank*, 10 Wallace, 604, or "continuously and publicly in the face of the power that had the right to protest," as Judge Thompson expresses it.

4 Thompson, Corporations, sec. 4884, 4886.

"But as the inherent power of the president is so much more limited than that of the cashier, the evidence of this character from which the right to exercise unusual power can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank."

*First Nat. Bank v. Kimberlands*, 16 W. Va., 581.

The testimony in this record cannot be said to establish such a usage as would justify the court in taking the question from the jury.

There is no conclusive testimony that Allis ever indorsed a note in the name of the bank except those in suit. Although the officers of the United States Bank testified in the case and were asked to state what officer of the Arkansas bank indorsed its name on notes previously discounted, none of them was willing to say that Allis had done so. The jury was at liberty to find that the notes in suit were the first he had ever indorsed and sent out for discount.

The authorities are uniform that a single or occasional use of power is not sufficient to establish a rightful use. Beyond that point, the evidence in this case is conjectural only, and did not justify the court in refusing to submit to the jury the question of fact involved.

Here is the testimony: C. T. Walker testified that while he was cashier of the Arkansas bank in 1891, the cashier or assistant cashier would confer with the president as to the quantity of, and the correspondent to whom, the notes for rediscount were to be sent (Tr., pp. 49, 50).

Q. Merely asked his advice in regard to it?

A. Yes, sir, generally asked his instructions.

Q. And the cashier attended to the business?

A. Yes, sir, or the assistant cashier (Tr., p. 49).

Q. *Did the president ever do anything of that kind?*

A. Not that I remember of.

From that evidence the jury could have inferred that the custom of the bank in 1891, was for the cashier or his assistant to transact the details of the business of rediscounting, which includes the indorsement of notes offered for rediscount. There

is no evidence that the method of transacting the business was ever changed.

E. J. Butler testified that he was a director of the defendant bank in 1891 and 1892, and also while Logan H. Roots was president prior to that time; that Roots, as president, had received special authority from the board of directors to make rediscounts, but that no such authority had ever been granted to Allis.

Q. Did he have authority from the bank to indorse its paper for rediscount?

A. No, sir; never that I was aware of (Tr., p. 53). "I know that there were discounts made, but I cannot recollect any particular rediscounts, but in case there were, I would suppose it was by authority of the board during some time while I was absent." He knew of no instance in which Allis indorsed the name of the bank upon commercial paper until the bank failed.

Q. Were you a regular attendant at the board meetings during that year, 1892?

A. Pretty regular, yes; nearly all the meetings.

Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

A. Never that I knew of.

Q. Who was the cashier of the bank during 1892?

A. Mr. Denney.

Q. Do you know whether he transacted the business as to indorsing and rediscounting for the bank?

A. I always supposed that he did.

Nick Kupferle, another director of the defendant bank and vice president during 1892, said the cashier always attended to

rediscounting. Did not know of Allis attending to that business, and that he had no authority from the board of directors to do so (Tr., p. 55). During that period the cashier was the chief officer, while Allis, as president, was in general control, but he added: "There is a good deal of business to be transacted by the cashier over which the president has no power," and he refused to state that Allis gave direction to the cashier in such matters (Tr., p. 56).

Q. Did you ever know of Mr. Allis indorsing the name of the bank upon its paper for the purpose of rediscounting it?

A. No, sir, never did.

Q. Did you not know he was using the name of the bank on the bank's paper?

A. No, sir.

Q. *You knew he was discounting paper?*

A. *No, sir; it was not his place.* I never knew anything about it until the failure of the bank—that he was using the bank's name (Tr., p. 58).

C. T. Abeles, who was a director during the year 1892, said Allis had no authority from the board to indorse its notes or to rediscount them, and that he never heard of his doing so until after the bank had failed. His information from other directors in 1892 was, that the cashier attended to such business (Tr., p. 58).

M. M. Cohn, who was a director for ten years continuously and went out in January, 1892, knew of no instance in which Allis had indorsed the bank's name upon paper for rediscount. He supposed it was always done by the cashier (Tr., p. 59).

M. H. Johnson (Tr., p. 47) and Oscar Davis (Tr., p. 50), who were cashiers of other banks in Little Rock, testified that it was the custom there for cashiers and not presidents to attend to rediscounting.

No other witness testified as to knowledge of Allis's acts or as to the custom of banks in Little Rock or elsewhere.

On three occasions previous to the one under consideration, Allis, as president, had written letters, inclosing notes to the defendant in error for discount. There is no proof that he indorsed any of the notes which he inclosed. In view of the custom of the First National Bank for the cashier to indorse its paper, the jury had the right to infer that all the notes inclosed in the letters written by Allis were indorsed by the cashier. They had the right to draw the same inference as to the indorsement of the two Dickinson Hardware notes, which were inclosed in the letter of December 13, 1892 (along with the notes in suit), inasmuch as they were shown to have been the bank's property. In the absence of proof to the contrary, the jury had the right to infer that the bank's paper had been rediscounted according to the usage of the bank. There is no presumption that the cashier varied from the established custom, or that he sanctioned an unauthorized course by the president.

It follows that the testimony warranted the jury in reaching the conclusion that the Arkansas bank's course of dealing with the public, and with the defendant in error, was not of a character to cause it to believe that Allis rightfully possessed the power to bind the bank by indorsement of its name upon com-



mercial paper; and it was error to refuse to submit the question to them.

The following quotations from the opinions of courts, are applicable to this phase of the case:

“An insuperable obstacle to recovery by the plaintiff in this case is, that it was not only not within the actual power, but it was not within the apparent power of the president to make notes belonging to, and payable to the order of, the company negotiable by his indorsement, or to negotiate them at all. Proof of one or the other of these facts, is essential to the plaintiff's right to recover, as well as that they are *bona fide* holders for value.”

Marine Bank v. Clements, 3 Bos., N. Y., 600.

“The president and secretary only, executed the note sued on, and there is no showing that any by-law, act, resolution, or custom of doing business, or authority, was conferred upon the two officers named to execute the note, or transact other business of the corporation. In the absence of such showing, it must be conceded that the note was not originally executed and delivered by the defendant.”

Catron v. Society of Manchester, 46 Iowa.

“If the company were authorized, in the exercise of legitimate business, to make it, the question is, whether the execution of the note was proved. It is signed by J. Averill, as president, and D. C. Judson, as secretary, and it is shown they were such officers at that time, and that Averill was *also the ‘managing agent.’* There is, however, nothing in the nature of those offices, as connected with the object and business of the company, from which a general power to make notes could be inferred. The

affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of the majority of those, duly assembled, as a board, was requisite to make a valid corporate act. The authority of the board, to the president and secretary, was therefore necessary to give validity to the note. This is not shown.”

*McCullough v. Moss*, 5 Wend. (N. Y.), 567.

“Much has been said in argument about the hardship of a decree declaring this bond and mortgage invalid, and about the innocence of Leggett. The transaction was, to say the least of it, incautious and unadvised, and if persons will deal, in matters of the most solemn character, with agents who undertake to act out of the scope of their ordinary and acknowledged powers, they must abide by the consequences. As to the innocence of Mr. Leggett, he believed, as he says in his examination, that the assent of the board to the giving of the mortgage had been obtained. I am bound to give credit to his testimony. I may, however, be permitted to say that he founded his belief upon a supposition, rather than a fact, and that he took no means to ascertain whether he was right or wrong. Whether the board had made the order was a matter about which Mr. Leggett could have satisfied himself by simple inquiry. He omitted to ask the question. If he was innocent, he was certainly neither careful nor prudent in the transaction, and I cannot consider him as standing in a situation that entitles him or the bank to the favorable consideration of the court.”

*Leggett v. Banking Co.*, 1 Saxton (N. J.), 550.

“The law in such cases requires clear proof of the authority of an agent to indorse negotiable paper, and the rule ought to be strictly observed.”

Davis v. Rockingham Investment Co., 89 Va., 290.

In the last case the court said: “It is proper to add that there is no question as to the *bona fides* of the appellant. He gave value for the note, supposing that the indorsement thereon was authorized and valid. But he did so at his peril and must bear the consequences.”

The question of Allis’s authority, under this phase of the case, was one of fact for the jury, but the court refused to submit it to them.

See Assignments of Error Nos. 3, 4, and 12.

Even if it had been shown that Allis was employed by the directors to run the bank, that would have constituted him the general agent only as to ordinary transactions incident to its business, and would not have authorized him to borrow money.

Fifth Ward Savings Bank v. First National Bank, 47  
N. J. Eq., 357.

Life, etc., Ins. Co. v. Mechanics Fire Ins. Co., 7  
Wend., 31.

McCullough v. Moss., 5 Wend., 567.

Western National Bank v. Armstrong, 152 U. S.,  
*supra*.

**It is not presumed that Allis had the power to bind the defendant bank merely because he assumed the right, as its president, to do so.**

All of the authorities heretofore cited sanction the foregoing declaration, expressly or impliedly. There are cases, however, in which it is stated that where it is within the charter powers of a corporation to do a particular act, and it is done by an officer of the corporation, there is a conclusive presumption that the officer had authority to do the act.

The doctrine appears to have been first announced by Judge Swayne in *Gelpeke v. City of Dubuque*, 1 Wallace, 175—a municipal bond case. The doctrine of such cases is that where the legislature vests municipal officers with power to decide a question of fact, the existence of which is made a condition to the issue of bonds, the decision of the officers is so far final that it cannot be collaterally attacked in a suit by a *bona fide* holder of the bonds. The recital of the existence of the condition and the issuance of the bonds constitute a determination of the fact by the officers, and the *bona fide* purchaser has the right to presume that they were issued under circumstances which would give the requisite authority. Hence the rule before stated. The same doctrine was inappropriately announced, though it does not appear to have been applied, in the case of a private corporation, in *Merchants Bank v. State Bank*, 10 Wallace, 664. Judge Swayne, in delivering the opinion, said: "If the contract can be valid under any circumstances, an innocent party has the right to presume their existence, and the corporation is estopped to deny them." The contract there spoken of was made by a

cashier while *acting within the apparent scope of his authority*, as the court assumed. If the language quoted states the law applicable to such a case, it would still have no application to a case like this where the officer was acting beyond the scope of both real and apparent authority. When an agent acts without even the appearance of authority, those dealing with him cannot legally assert that they are misled by a false appearance; hence the doctrine of estoppel can have no application. The failure to appreciate this very plain distinction accounts for the error of some of the decisions, conspicuous among which are:

American Ex. Nat. Bank *v.* Oregon Pottery Co., 55  
Fed. Rep., 265.

Thomas *v.* City Nat. Bank (Neb.), 58 N. W. R., 943.

The point actually decided in *Merchants Bank v. State Bank*, *supra*, seems to be that if an officer of a corporation has apparent authority to act, and there is nothing to excite suspicion of a want of actual authority, the corporation is bound. The court said: "It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred the cashier had authority to bind the defendant." That is exactly what the plaintiff in error asked the court to do in this case as to Allis's authority.

The execution by an agent of a contract which he has no authority to make, amounts to no more than an assertion on his part that he possesses the requisite authority. But a corpora-

tion is not bound by its agent's representations as to his authority or power, any more than a private person is.

4 Thompson, Corporations, sec. 4880.

"It cannot escape attention that the doctrine as thus expressed" (referring to Judge Swayne's *obiter* quoted above about presumption of authority), "is entirely opposed to the general rule that persons dealing with corporations or other principals are bound, at their peril, to take notice of the limitation of the authority of the agents through whom they deal. \* \* \* On the whole it is difficult to find support in reason for the proposition that a man can acquire power by merely exercising it. A single seizure or exercise of power can never, in a judicial sense, be evidence of its rightful possession; there must be something in the nature of a continual or habitual exercise of it, publicly and in the face of those who have the right to oppose it."

4 Thompson, Corporations, sec. 4882.

In *City Electric Street Railway v. First National Bank*, 62 Ark., *sup.*; S. C., 34 S. W. R., 89, the Supreme Court of Arkansas reviews the cases following Judge Swayne's *dictum*, and says that the doctrine "is unsound and not supported by the weight of authority. Besides," says the court, "the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in *Bank v. Armstrong*, 152 U. S., 346." The following cases are to the same effect:

*Mechanics Bank v. Bank*, 5 Wheaton, 326.

*U. S. v. City Bank of Columbia*, 21 How., 356.

*The Floyd Acceptances*, 7 Wall., 666.

*Friedlander v. Texas & Pacific Ry.*, 130 U. S., 416.

Western National Bank *v.* Armstrong, 152 U. S., 346.

The case of People's Bank *v.* National Bank, 101 U. S., 181, has been cited to sustain the position that it will be presumed that an officer of a national bank "has rightfully the power he assumes to exercise," and that the bank is estopped to deny it. The remark is *obiter*; it was made by the judge who delivered the opinion in Merchants Bank *v.* State Bank, 10 Wallace, *supra*, and that case alone is cited. No question of the authority of an officer or agent of the bank could arise upon the facts stated by the court in the People's Bank case. The facts appear to be as follows: The defendant bank, through its vice president, procured the plaintiff bank to discount certain notes executed by one Picket, the payment of which the defendant guaranteed. "Picket delivered the notes to the defendant to be negotiated to the plaintiff, pursuant to a prior agreement made between him and *the defendant* that the latter should so negotiate the notes" (opinion, p. 181). The vice president carried out the prior agreement made by the bank. As it is stated by the court that the bank itself made the agreement, and that it was carried out according to its terms, of course it would be presumed that the officer who executed it had authority to do so.

The Supreme Court of Arkansas in City Electric Street Railway Co. *v.* Bank, *supra*, speaking of the *dicta* in these cases, and quoting from 2 Morawetz, Priv. Corporations, sec. 608, says: "They must be considered in view of the facts of the particular cases in which they were made. Taken alone as statements of a principle of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle."

Nor does the fact that the act of the officer or agent relates to the negotiation of commercial paper make any difference.

**The protection which commercial usage throws around negotiable paper cannot be used to establish the authority of an agent to issue or indorse it.**

This principle, said Judge Miller, in the *Floyd Acceptances*, 7 Wallace, 666, 676, is well established in regard to the transactions of individuals, and it is equally applicable to those of corporations. The purchaser of negotiable paper, he said, must, at his peril, see that the officer executing it had authority to bind his principal.

"The first question which propounds itself to a party treating with another who represents himself to be an agent and offers to execute or indorse a negotiable instrument in the name of an alleged principal, is this: Has this person authority to bind his alleged principal in this manner? The inquiry is vital. For if there be no such authority, the alleged principal is not bound."

1 Daniel, *Neg. Instruments*, sec. 273; *ib.*, 279.

"The very fact to be proved by the plaintiff, and without proving which he could not advance a step, was whether an agency to make" (in this case to indorse) "notes had been constituted at all. This could not be proved by the declarations of the assumed agent or by his representations. \* \* \* The plaintiff failed on the vital issue of authority."

*People's Bank v. St. Anthony's Church*, 109 N. Y.,  
512, 525, 526.



To the same effect see

City Electric St. Ry. *v.* First National Bank, 62 Ark.,  
*supra*.

Chemical National Bank *v.* Wagner, 93 Ky., 525.

West St. Louis Sav. Bank *v.* Shawnee Bank, 95 U. S.,  
557.

McCullough *v.* Moss, 5 Denio., 567.

Davis *v.* Rockingham, 89 Va., 290.

These authorities effectually meet the argument of the defendant in error that the burden was on the receiver to show that it took the notes with such knowledge of the fraud of Allis as would amount to bad faith on its part.

That rule of the law-merchant which was intended to protect the innocent holder of negotiable paper, does not enter into this case at all. The United States Bank was bound to look to the authority of the agent through whom it sought to derive title to the notes (Authorities, *supra*).

**The form of the notes, while they were in Allis's hands, was constructive notice that the Arkansas bank was an accommodation indorser, and that Allis was using its name for his personal benefit.**

The following facts constitute a signal of warning that Allis was using the bank's name for his own benefit, viz: *In three of the notes Allis was payee; on all of them his personal indorsement immediately preceded that of the First National Bank; the name of the bank appeared upon the notes as indorsed by him as president; while he himself offered the five notes together to the defendant in error.*

Here then was the payee of three of the notes having them in possession. The presumption of law that faced the United States Bank under these circumstances was that the Arkansas bank, which appeared as a subsequent indorser, was an accommodation indorser.

1 Daniel, Negotiable Inst., sec. 753.

Lemoyne v. Bank, 3 Dill., 44.

Savings Bank v. Parmelee, 3 Dill., 403.

Adrian v. McCaskill, 9 S. E. Rep. (N. C.), 284.

The same rule applies to the other notes, for as Allis was a party to the notes and had them in possession, the United States bank was bound to assume that he was the owner and that the subsequent indorser was an indorser for accommodation.

“An individual negotiating for the purchase of a bill or note *from one having it in possession, and whose name appears upon it*, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument.”

Central Bank v. Mammett, 50 N. Y., 158.

As Allis appeared as a party to all the notes and was in possession, the law cast upon the United States Bank the duty of regarding him as the owner, and the Arkansas bank as an accommodation indorser. In that contingency of course there could be no recovery.

But the notes bore evidence of their own death wound in another way. Allis, the payee, and Allis, the indorsee, indorsed

the name of the First National Bank immediately under his individual indorsement. The notes show that the bank's indorsement was made by Allis, for after the bank's name he affixes his own name as president in such way as to plainly indicate that the bank's signature was made by him. Allis was in the corporal possession of the notes. Here again was unmistakable evidence that Allis was using his official trust for his individual interest.

West St. Louis Sav. Bank. *v.* Shawnee Co., 95 U. S., 557.

Park Hotel Co. *v.* Fourth Nat. Bank, 86 Fed. Rep., 742.

Claffin *v.* Farmers Bank, 25 N. Y., 293.

Lee *v.* Smith, 84 Mo., 304.

Lippencott *v.* Shaw Carriage Co., 25 Fed. Rep., 582.

Anderson *v.* Kissam, 35 Fed. Rep., 703.

N. Y. Iron Mine *v.* Negannee Bank, 39 Mich., 644.

The first decision of the United States Circuit Court of Appeals in this case evaded the effect of both classes of the foregoing decisions by the simple suggestion that "the defendant bank itself offered the notes for rediscount." If that is a fact the conclusion is certainly correct. But there is no question upon this record but that Allis was the person who presented the notes for discount. He asserted, it is true, that he presented them on behalf of his bank, but can the United States Bank be heard to say that it was misled by Allis's assertion? Allis was a party to the notes which he offered, and the law apprised the United States Bank that the Arkansas

bank's attitude was just what it appeared to be upon the notes in his hands, notwithstanding his representations to the contrary.

*Central Bank v. Mammett*, 50 N. Y., *sup.*

When the United States Bank was put upon notice that Allis had placed his official indorsement upon his individual notes for his personal benefit, could it relieve itself of its legal obligation to make inquiry of the Arkansas bank, by asking Allis, the perpetrator of the apparent fraud, whether he represented himself or his bank in the transaction? It is obvious it could not.

If Allis had personally presented the notes in suit to the United States Bank for discount, without pretending to represent the Arkansas bank, the United States Bank would have been apprised at once that the Arkansas bank was an accommodation indorser for Allis's benefit, because Allis, the payee and prior indorser, was in possession of the notes. In that case there could have been no recovery against the Arkansas bank. Unless the United States Bank was justified in accepting Allis's statement that his designs were honest, there is no difference between that case and this.

When Allis, as president (impliedly) represented to the United States Bank that his bank had authorized him to indorse its name upon a note then in the possession of Allis, the payee, the United States Bank knew that if his statement was false the Arkansas bank would not be liable upon the indorsement; and it knew that the notes were then in the corporal possession of Allis, the payee and prior indorser, and that it was his hand that had written his bank's indorsement under his personal indorsement, where it would do him the most good if his statement was false. If the knowledge of these facts did not bring home to the United

States Bank notice of Allis's intended fraud, it at least made it the duty of the United States Bank to inquire of the Arkansas bank whether Allis was authorized to represent it.

"Actual notice in such cases is not required, even in suits upon negotiable securities. \* \* \* Constructive notice in such cases is held sufficient, upon the ground that *when a party is about to perform an act which he has reason to believe may affect the rights of third parties*, an inquiry as to the facts is a moral duty and diligence an act of justice."

*Angle v. N. W. Mut. Life Ins. Co.*, 92 U. S., 330, 342.

The authorities are hereinbefore collected to show that the rule of the law-merchant that facts sufficient to put one upon inquiry are not enough to defeat an innocent purchaser of commercial paper, has no application to a case like this. The United States Bank was bound to look to the authority of the supposed agent with whom it dealt, and any fact which raised a reasonable suspicion of his want of authority was equivalent to notice.

See ante., p. 39.

In *West St. Louis Sav. Bank v. Shawnee Co.*, 95 U. S., *sup.*, G. F. Parmelee, who was cashier of the Shawnee County Bank, made his individual note payable to the order of the West St. Louis Savings Bank, and indorsed it: "G. F. Parmelee, cashier." Chief Justice Waite said: "The form of the paper itself carries notice to the purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is suggested to him, it is his own fault, and as against an innocent party, he must bear the loss."

S. C., 3 Dill., 403.

In *Anderson v. Kissam*, 35 Fed. Rep., *sup.*, Judge Wallace said that in such a case "it can make no difference whether the agent or officer appears to be the party to whom the paper is payable upon the face of the instrument, or whether it appears by extrinsic facts that he is the real party for whose benefit it was made; consequently when he offers the instrument under circumstances which show that he has made it officially for his private use, the party dealing with him must take notice of his want of authority, and cannot treat it as the obligation of the principal, unless he can prove the existence of some special and extraordinary authority on the part of the agent."

The case of *N. Y. Iron Mine v. Negannee Bank*, 39 Mich., 644, was a suit on three promissory notes, which had been discounted by the plaintiff; they are set out at page 648 of the report. The second note was made by one corporation, payable to another and indorsed by the latter, both acting through the same agent, Wetmore. Judge Cooley for the court, treating of all the notes, said:

"Moreover, there was that on the face of these notes to suggest special caution; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them, which was adverse to the interest of his principal.

\* \* \* We do not think that when the bank discounted such paper without inquiry into the authority of Wetmore, it gave such evidence of prudence and circumspection as placed it in a position to complain of Mr. Tilden's course of business as negligent. A fair statement of the case for the plaintiff is that both

parties have been overtrustful in their dealings with Mr. Wetmore; the defendants not more so than the plaintiff. Unfortunately for the plaintiff the consequences of the overtrust have fallen upon its shoulders."

If there was that on the face of the second note mentioned to suggest caution to the discounters, it should be said that the notes in suit here bore a red light signal of warning. The second note in the last case, as the court said, "was made by Wetmore in one capacity and indorsed by him in another so that apparently he was dealing with himself in making and negotiating all of them" (pp. 650, 651). He was not dealing with himself individually, and yet the court says the form of the note suggested an interest in Wetmore.

The defendant in error argues that it made inquiry and received no intimation from the Arkansas bank that Allis had not the necessary authority. The letter to Denney, the cashier of the Arkansas bank, from the defendant in error which it relies upon, was written after the money had been advanced, and it was received in Little Rock after Allis had appropriated the money to his own use. The uncontroverted evidence is that the money was advanced by the defendant in error and deposited in accordance with Allis's letter of instruction immediately upon its receipt. On the same day Allis took credit for the full amount of the proceeds of the notes upon the books of the Arkansas bank and appropriated the money to his own use. But beyond that, the letter contained no inquiry as to Allis's authority to discount the notes in suit, nor any direct information that they had been discounted upon the credit of the Arkansas bank. It inclosed a note belonging to the latter bank, which it said it had

discounted in accordance with the previous letter from Allis. Allis had inclosed other notes belonging to the bank in the letter containing the notes in suit, and no distinct notice was brought home to Denney that Allis had indorsed any notes, not even those belonging to the bank. By whomsoever the latter were indorsed, the bank got the proceeds, and the knowledge of that fact ended Denney's duty of inquiry. If Allis had caused his own paper to be discounted by the United States Bank at the same time (as appeared to be the case), and credit given to the Arkansas bank for the proceeds on the books of the former, as a convenient method of transmitting the funds to Little Rock, he could take credit individually upon the books of the Arkansas bank without exciting a suspicion upon that score. The jury had a right to conclude that that was the form in which the matter presented itself to Denney, and the question should have been submitted to them. That is a common transaction in banking. *Knowledge of the entries, therefore, crediting the Arkansas bank with the amount received from Allis through the latter bank, did not impute knowledge of the fact that Allis had obtained the money on the bank's indorsement.* But if it had been shown that Denney had full knowledge of the transaction after the loan was effected, that would not have the effect of validating it. He had no such power. It was even beyond the power of the board of directors to ratify the transaction unless the bank had received the proceeds of the loan.

Western National Bank v. Armstrong, 152 U. S.,  
*supra.*

In that case the acting cashier of Harper's Bank knew as much about the fraudulent transaction as Denney did of this.



It is submitted that if there were nothing in this case save the proof of Allis's want of authority and the form of the notes, the judgment should be affirmed.

**The Arkansas bank did not ratify the president's act.**

There is not the slightest evidence in the record that the board of directors of the Arkansas bank, by any act, formal or informal, undertook to ratify Allis's action in the premises, or that any member of the board ever had any knowledge of the transaction prior to the bank's failure.

"It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts."

Western Nat. Bank *v.* Armstrong, 152 U. S., *sup.*

It is not sufficient for the purpose of ratification that the board of directors might have known the facts of the transaction by the exercise of reasonable diligence in the conduct of the bank's affairs.

The question was maturely considered in *Murray v. Nelson Lumber Co.*, 143 Mass., 250. The court's language is applicable to this case:

"It is a well settled rule that a ratification of the unauthorized acts of an agent, in order to be effectual, must be made with knowledge on the part of a principal of all the material facts. And the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. *It is not enough for him to*

*show that the principal might have known the facts by the use of diligence.*

Coombs v. Scott, 12 Allen, 493.

\* \* \* \* \*

"In the case at bar, therefore, it was incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge, they acquiesced in and adopted it.

"But the instructions given by the court gave to the jury a different test. Under them the jury would naturally understand that it was not necessary to find that the directors knew of the contract, but that it would be sufficient if, in their judgment, the directors, by the use of diligence, might have known it. The instructions are even broader than this, as they told the jury that the directors were presumed to know, and that the jury had a right to suppose, that the directors of a corporation had knowledge of its concerns.

"The inferences which may be drawn from the relation of the directors to the corporation and its concerns, as to the probability of their having a knowledge of the contract in question, is a matter exclusively for the jury. There are no such presumptions of law as those stated in the instructions."

To same effect see

Briggs v. Spaulding, 141 U. S., 132.

*It has been argued that the Arkansas bank received the proceeds of the notes and that it is liable for that reason.*

It has never been so ruled in this case, and the facts do not bear out the contention.

The discount was made in New York City, for, or through Allis, on December 16, 1892, and the proceeds were placed to the credit of the Arkansas bank, on the books of the United States Bank, on December 17, before the transaction was known to anyone at Little Rock, except Allis. He took credit upon the books of the Arkansas bank for the full amount of the proceeds of the notes sued on, as for money procured on his own account from the United States Bank. This was done by a bookkeeper of the Arkansas bank under Allis's direction. At the same time the account of the United States Bank was charged a corresponding amount in obedience to the following charge ticket made and signed by Allis, as president: "Charge United States National Bank, N. Y., for proceeds, Allis, \$25,000." The credit ticket, which was also made out by Allis, read as follows: "Deposit in First National Bank, Little Rock, Ark., by H. G. Allis, December 17, 1892. United States National Bank, \$25,000;" which means, according to the explanation given in the record, "that Mr. Allis had procured \$25,000 of the United States National Bank, which was placed to his credit." The entries were made in the books to accord with the tickets.

It was proved that when the money was placed to the credit of Allis, it was used by him, and that the Arkansas bank got no benefit from the transaction; that he began to draw checks upon the amount at once and was continuously indebted to the bank thereafter (Tr., p. 87). The credit to the Arkansas bank on the books of the United States Bank (created apparently by a deposit of that amount of money there by Allis for his own use) was drawn out in the regular course of business to reimburse the bank for the amount already paid Allis at Little Rock.

It is evident that the Arkansas bank received no benefit from the transaction. It received a credit upon the books of its correspondent in New York, made a corresponding charge upon its own books and paid out the money to the person who caused the credit to be made in New York. As is explained in the record, it was "simply a switching of balances" (Tr., p. 86). On the trial of *United States v. Allis*, Judge Sanborn said of a similar transaction, that it did not show a benefit derived by the bank, but was only a method of bookkeeping.

The facts in *Western National Bank v. Armstrong*, 152 U. S., *sup.*, are substantially the same as those above detailed, and it was there held that the bank occupying the position of the Arkansas bank here, received no benefit. To same effect see

*Morris v. Griffith Wedge Co.*, 69 Fed. Rep., 131.

*First Nat. Bank v. Hanover Nat. Bank*, 66 Fed. Rep., 34; S. C., 13 C. C. A., 313.

*State National Bank v. Newton National Bank*, 66 Fed. Rep., 694; S. C., 14 C. C. A., 61.

*Chemical Bank v. Armstrong*, 65 Fed. Rep., 573.

*Lemoyne v. Bank*, 3 Dillon, 44.

*Farmers Bank v. Bank*, 58 Fed. Rep., 638.

But it is argued that the following testimony shows that the Arkansas bank received a part of the proceeds to its own use, viz: "The individual account of H. G. Allis showed an overdraft of \$10,678.44 at the beginning of business on December 17."

There was no evidence of the state of the account *at the time the entries were made* on December 17; and the court will bear in mind the previous testimony that Allis thereafter was

in debt to the bank and that it derived no benefit from the transaction.

But if the proof showed that Allis paid a debt of \$10,678, to the bank out of the \$25,000 received by him, that would not show a ratification by the bank. If the bank had received the whole \$25,000 in the same way, it would not amount to a ratification for two reasons, viz: (1) Allis thereby merely discharged a debt, and (2) the directors were ignorant of that fact and all others relating to the transaction.

In *Burnett v. Gustafson*, 54 Iowa, 86, the owner of cattle in Iowa gave a chattle mortgage on them, which was duly recorded. He sold the cattle in a distant city; deposited the proceeds in bank there to the credit of his own bank in Iowa; the latter bank passed the proceeds to his individual credit and applied them to the payment of an antecedent debt due it. An effort was made by the mortgagee to compel the bank to pay the money received by it. The court said: "It is claimed that the bank must account for the money because it received it in payment of a pre-existing debt. Whatever may be regarded as the proper rule respecting the transfer of other property in payment of debts, it cannot be denied that the payment of money in that manner is in accordance with the usual custom of business;" and relief was denied.

In *West St. Louis Savings Company v. Shawnee County Bank*, 3 Dillon, 403, Parmelee was cashier of the defendant bank and was indebted to it. The plaintiff advanced money on a note indorsed by Parmelee as cashier of the defendant bank. The latter bank was sued on its indorsement. Parmelee had indorsed his bank's name upon the note for his own use; his bank,

however, got the proceeds of the note. The directors of the defendant bank did not know of the unauthorized indorsement, and the bank having received the proceeds only in payment of a debt due to it, it was held not liable. The case was affirmed under same style in 95 U. S., 557. To same effect see

*Bohart v. Osborne*, 36 Kan., 284.

*Thatcher v. Gray*, 113 Mass., 291.

To effect a ratification of a contract made by an unauthorized agent by appropriation or retention of the benefits of the contract, the appropriation or retention must be made by the principal with knowledge of the facts. In other words, retention of the benefits without knowledge is not enough.

*Western Nat. Bank v. Armstrong*, 152 U. S., 346,  
352.

"It is indispensable that the principal should have the full knowledge of the material facts, otherwise the receipt and retention of the benefits of the unauthorized act is no ratification."

*Meecham's Agency*, sec. 148.

"A stockholder, who was a treasurer of a street railway corporation, wrote to a customer that she could lend the proceeds of bonds sold by him for her to the corporation, and she told him that she would so lend a part thereof to it, and left the amount in his hands, receiving from him therefor a note made in his name by him alone as treasurer. She was ignorant of and made no inquiries as to its by-laws, which provided that he could sign notes only as the directors might require, but acted in good faith, believing that he also acted honestly and had authority to make the loan and give a note therefor binding on the corporation. The treasurer, who had no such authority in terms, and was a

defaulter, used the loan to cover up his defalcation by paying debts of the corporation. Held, that the customer could not recover against the corporation, either upon the note, or for money had and received."

Craft v. Rebecca Ry., 150 Mass., 209.

In that case the treasurer used the plaintiff's money, which he obtained upon a note executed in the name of the defendant corporation, "to cover up and conceal his shortage to the defendant," but the receipt of the proceeds of the note in that way did not render the company liable.

To same effect see

Kelly v. Lindsey, 7 Gray, 287.

Railroad Nat. Bank v. City of Lowell, 109 Mass., 214.

Agawam Nat. Bank v. South Hadley, 128 Mass., 503.

There is nothing in the judgment in People's Bank v. National Bank, 101 U. S., 181, opposed to the cases cited. In that case the defendant bank, in order to raise money for its own use, got the plaintiff bank to discount Picket's notes, accompanying them with its written guarantee to pay them at maturity. "Picket delivered the notes to *the defendant* to be negotiated to the plaintiff, pursuant to a prior agreement between him and *the defendant*, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant." This statement of fact, taken from the opinion, shows that the act done in that case was not by an unauthorized agent for his own benefit and without the knowledge of the principal, but by the principal itself for its benefit. "The doctrine of *ultra vires*," say the court, "has no

application to a case like this"—the most obvious meaning of which is, that if the defendant bank had no power to execute a guarantee or no power to borrow money, still as the bank (not its unauthorized officer) had itself gotten money on its contract, it must repay it.

### RECAPITULATION.

It cannot be said that the plaintiff acquired the notes in the usual course of business, because: (1) It was a loan to a national bank, which was itself unusual; (2) the loan was not made for legitimate banking purposes; (3) it was unusual for banks in Little Rock or elsewhere in the South to discount at that season of the year; (4) the loan was made upon an unusual length of time (76 Fed. Rep., 345); (5) *it was in excess of 10 per cent of plaintiff in error's capital stock* (Bank v. Armstrong, 76 Fed. Rep., 339, 344); (6) it was unusual for the president of a bank in Little Rock to negotiate loans, even if that officer can be said to have such power elsewhere; (7) the president acted wholly without authority in indorsing the notes; (8) and the form of the notes imparted notice that the president was using the bank's name for his own accommodation.

### COUNTERCLAIM.

The answer of the defendant in error admitted its indebtedness to the Arkansas bank, and alleged that the sum due was applied as a credit upon the notes sued on (Tr., p. 5). It is not conceded that there was any proof of such an application of payment. If so, the application was after the appointment of the receiver and unauthorized. The receiver was therefore entitled



to a judgment on his counterclaim. There was no plea of set-off. A plea of set-off would have been of no avail in a suit at law.

Scott v. Armstrong, 146 U. S., 499.

It follows that even if the defendant in error had obtained judgment upon the notes sued on, the receiver would have been entitled to an independent recovery against the defendant in error, for the amount of the counterclaim.

It is respectfully submitted that the judgment should be reversed.

STERLING R. COCKRILL,

*Attorney for Plaintiff in Error.*

No. 206.  
APR 13 1899

JAMES H. McKENNEY,  
Clerk.

MAR 1 1899

JAMES H. McKENNEY,  
Clerk.

*Brief of Herron v Oldham for*  
**SUPREME COURT OF THE**  
**UNITED STATES.** *App. in 279*

*Filed Apr. 13, 1899.*

OCTOBER TERM, 1898.

DAVID ARMSTRONG, Receiver of The Fidelity  
National Bank of Cincinnati, Ohio,  
Appellant,

vs.

THE CHEMICAL NATIONAL BANK of New  
York.

No. 279.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

JOHN W. HERRON,  
FRANCIS F. OLDHAM,  
Counsel.

APR 18 1908

200

UNITED STATES SUPREME COURT OF THE

October Term 1908

THE UNITED STATES OF AMERICA  
vs.  
JOHN D. BROWN

Plaintiff in Error

THE UNITED STATES OF AMERICA  
vs.  
JOHN D. BROWN

Plaintiff in Error

JOHN D. BROWN  
vs.  
THE UNITED STATES OF AMERICA

Defendant in Error

# **SUPREME COURT OF THE UNITED STATES.**

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**OCTOBER TERM, 1898.**

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**DAVID ARMSTRONG, Receiver of The Fidelity  
National Bank of Cincinnati, Ohio,**

**Appellant,**

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**THE CHEMICAL NATIONAL BANK of New  
York.**

**No. 279.**

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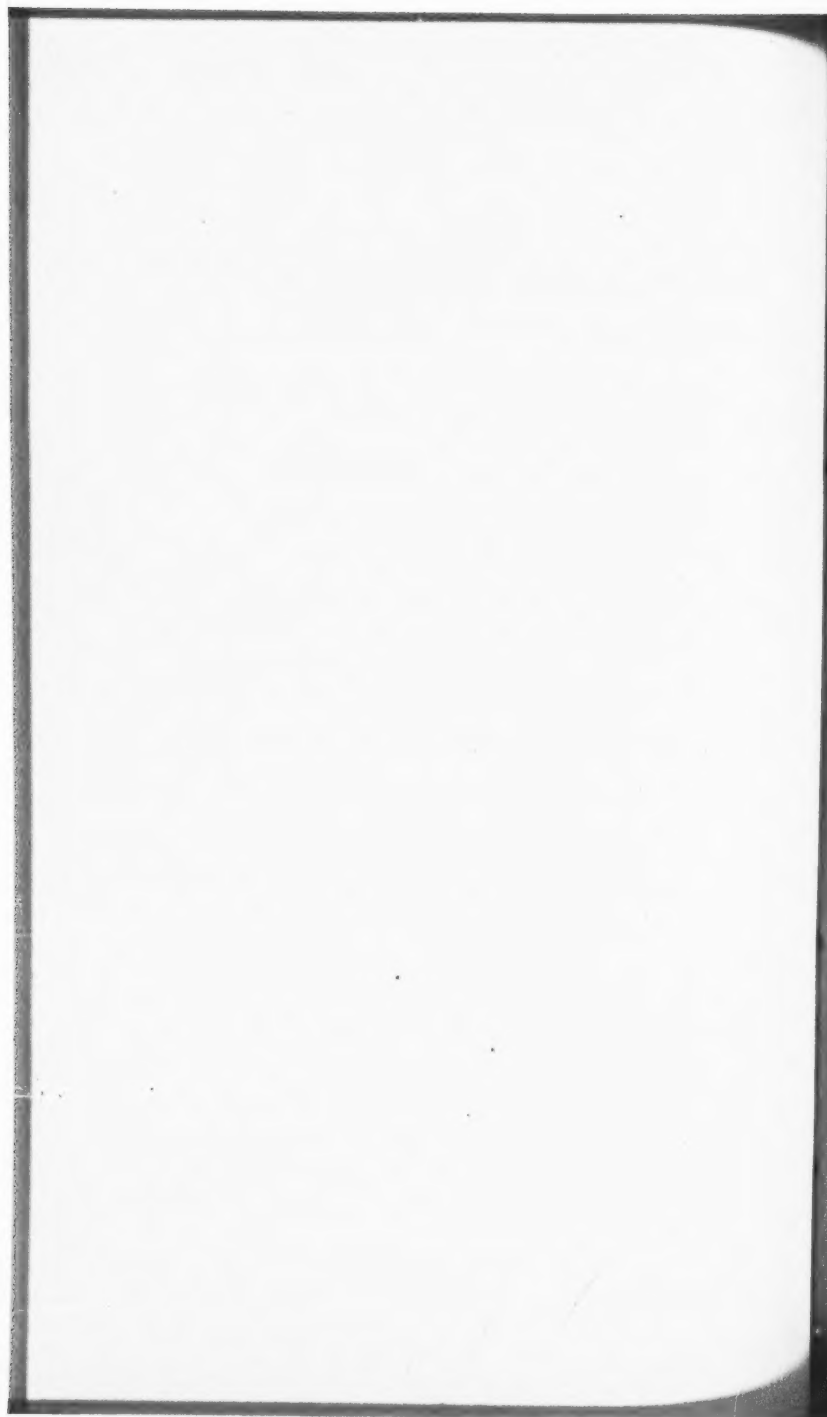
**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
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**BRIEF FOR APPELLANT.**

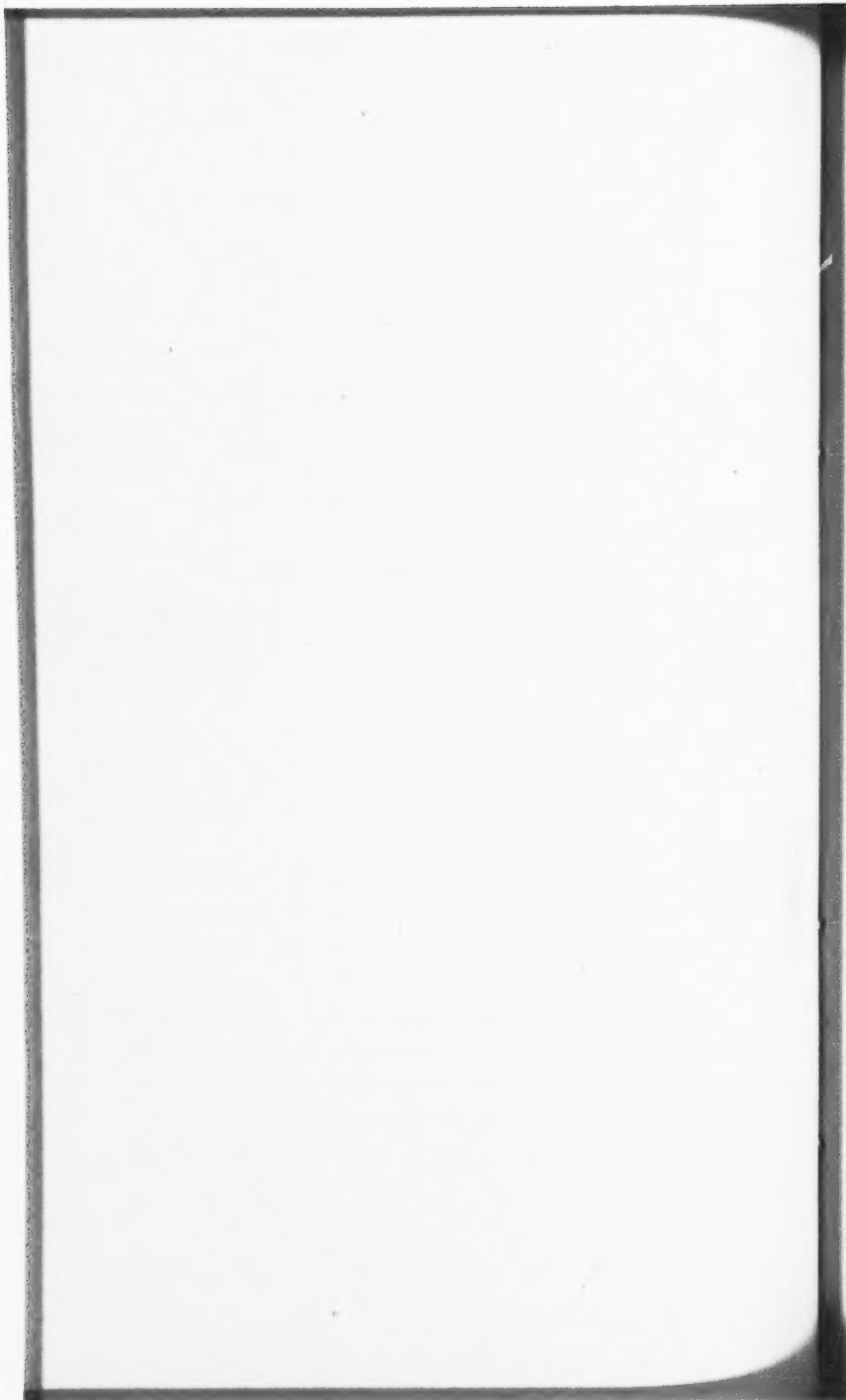
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**JOHN W. HERRON,  
FRANCIS F. OLDHAM,  
Counsel.**



# INDEX.

	PAGE.
Statement of the case . . . . .	I
Specification of errors . . . . .	7
Argument . . . . .	8
Loan was to Harper, not to the Fidelity National Bank . . . . .	8
Western National Bank v. Armstrong similar and conclusive . . . . .	11
Comparison of the cases . . . . .	14
Lending banks can not by custom confer authority on officers of borrowing banks . . . . .	18
Alleged negligence of directors immaterial . . . .	28
Consisted in not supervising Harper's loans . .	29
Authorities on ratification . . . . .	31
No ratification by the Fidelity Bank . . . . .	39
Watters' knowledge of "Tem. loan \$300,000" . .	42
No enjoyment of proceeds by the Fidelity Bank .	47
Collaterals should be deducted when paid before proof of claim . . . . .	53
Pennsylvania doctrine criticised . . . . .	90
Other contrary authorities reviewed . . . . .	94
Cook Co. National Bank v. United States . . . .	99
Collateral lost by negligence should be credited .	104
Interest improperly allowed . . . . .	107



# SUPREME COURT OF THE UNITED STATES.

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DAVID ARMSTRONG, Receiver of  
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*Appellant,*

*v/s.*

THE CHEMICAL NATIONAL BANK,  
OF NEW YORK.

No. 279.

**Appeal from the United States Circuit Court of Appeals for the  
Sixth Circuit.**

## STATEMENT OF THE CASE.

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On the 10th day of May, 1890, The Chemical National Bank of New York, filed its bill in equity in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant, David Armstrong, Receiver of the Fidelity National Bank, of Cincinnati, to compel the allowance of a claim for \$300,000 for money alleged to have been loaned by appellee to the Fidelity National Bank on the 2nd day of March, 1887. The bill alleges that the Fidelity National Bank, at the time of the loan, delivered to appellee, as collateral security, certain promissory notes



of the aggregate face value of \$326,695.30, some of which were afterwards surrendered and other notes substituted therefor. A list of the notes so held by appellee after the substitution is set forth in a schedule attached to the bill, marked "Exhibit A." The bill admits that the sum of \$75,000 in the aggregate had been realized by the appellee on the collaterals, which amount appellee claims to hold in lieu of the notes so paid. The prayer is, that the amount due upon the loan may be ascertained; that appellee may be decreed to be a creditor of said Fidelity National Bank in the sum so found due, and entitled to receive dividends with interest thereon from the time that dividends were paid to other creditors of said bank by the Receiver, until the dividends to be received by appellee with the proceeds of collaterals realized shall fully pay the amount of its claim. The answer of appellant, as amended, denies that the loan was made to the Fidelity National Bank, but alleges that Edward L. Harper, vice-president of the Fidelity National Bank, borrowed the money without authority from the bank, and used the same individually. The answer further alleges, as a partial defense, that, by the negligence of appellee, an indorser upon one of the notes for the sum of \$25,000, received as collateral security by appellee, was discharged, and that the sum of \$75,000 realized upon the collaterals had been credited by appellee on its claim. The answer claims that, if appellant is liable at all, the amount lost by the negligence of appellee and the amount realized by it on the collaterals should be first credited on the claim; also that appellee should be required first to exhaust the collaterals still held by it, and apply the proceeds on its claim, and be permitted to prove its claim only for the balance thereafter remaining due.

To the answer the complainant filed a general replication. Upon trial in the Circuit Court, it was held that the claim

was a valid claim, but the Court deducted all collections made upon collaterals prior to the filing of the claim, and rendered judgment for the balance.—(50 Fed. 798.)

Both parties appealed from this decision. On hearing before the Circuit Court of Appeals, that Court reversed the decision of the Circuit Court, and not only held the claim to be a valid one, but held that it should have been allowed for the full amount, regardless of proceeds realized from the collaterals.—(59 Fed. 372.)

On a petition for rehearing, the Circuit Court of Appeals modified this decision and reversed the cause, and remanded it to the Circuit Court, with instructions to permit either party to take additional testimony upon the issue, whether the Fidelity Bank owes anything to the Chemical Bank, by virtue of the alleged loan. That if the issue be decided in favor of the Receiver, the bill should be dismissed, and a decree entered in favor of the Receiver for the restitution of the \$100,000 paid by the Receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below. That if the liability of the Fidelity National Bank should be established, a decree to be entered directing the Receiver to allow the claim of \$305,450 (being the amount of the loan and interest until the date of the insolvency, June 21, 1887), and to pay the dividends accruing on said claim, with interest, on those declared before April 25, 1890, from that date, and on those thereafter declared from the date of declaration, etc., etc. (65 Fed. 573.) The cause was again tried upon additional evidence in the Circuit Court, which decided the issue upon the liability of the Fidelity National Bank against the Receiver, and judgment was there entered in accordance with the mandate of the Circuit Court of Appeals. (Rec., p. 266 and 76 Fed. 339.) From this decree the Receiver again appealed to the Circuit Court of Appeals, which affirmed the

decree of the Circuit Court with costs. (Rec., p. 283 and 83 Fed. 556.) The Receiver of the Fidelity National Bank filed his petition for appeal from that decree to this Court (Rec., p. 307), and the appeal was allowed by the Circuit Court of Appeals. (Rec., p. 309.)

The facts appearing by the evidence, and practically undisputed, are as follows :

On February 28, 1887, E. L. Harper, the Vice-President of the Fidelity National Bank, enclosed to the Cashier of the Chemical National Bank, of New York, the Fidelity's certificate of deposit for \$300,000, payable to the order of E. L. Harper, and also a large amount of bills receivable as collateral to the certificate, and requested the Chemical to place the amount to "our" credit and advise the rate. Copies of this letter and of the certificate of deposit, and a list of the collaterals sent with it, appear on pp. 17-19 of the printed record. The answer of the Chemical, dated March 2, 1887 (Rec., p. 29), advises the Fidelity of the receipt of letter of February 28, and that the Chemical had credited the Fidelity \$300,000.

The letter of E. L. Harper of February 28, 1887, was not copied into the letter-book of the bank (Rec., p. 65, Q. 32, 33), and there is no evidence that any other officer of the bank knew of its existence. At the time E. L. Harper did not have \$300,000 to his credit in the bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate. The certificate itself did not appear on the books of the bank. It was not written on a blank certificate of deposit, taken from the usual place in the book of certificates, either as to date or number, but it was torn out of the back of the book (Rec., p. 63, Q. 9, and p. 98) and filled in by Miss Holmes, the acting exchange clerk of the bank. What knowledge either she or the cashier had of the object of this

certificate we do not know. Miss Holmes has disappeared, and the cashier is dead, so that we have no statement from either of them as to the circumstances attending the issuing of this certificate. It was probably done by order of Harper, without any other knowledge in regard to it. The Chemical, on March 2, 1887, placed to the credit of the Fidelity \$300,000, and on the same day notified it of this credit. On the same day, by direction of E. L. Harper, entries were made on the books of the Fidelity charging this sum to the Chemical, and crediting the amount to Harper. Mr. J. H. Watters' on pages 63-65 of the printed record, explains how this was done, and gives the original tickets handed in at the time. They are Watters' Exhibits 2 and 3. (Rec., p. 98). His statement is as follows:

"Mr. Edward L. Harper, the Vice President of the Fidelity National Bank, came to my desk—the general book-keeper's desk — and gave me a charge ticket, asking me to place it to his credit.

(Copy of charge ticket.)

CINCINNATI, 1887.

THE FIDELITY NATIONAL BANK.

Credit Check.

Transfer of funds . . . . . \$300,000

E. L. H.

Charge Chemical N. Y.

I think I made out the charge deposit ticket, which was given to the receiving teller, who in turn entered it on the desposit book of the Fidelity, and by the individual book-keeper placed to the credit of Edward L. Harper. The charge ticket went to the general bookkeeper, who in turn charged a like amount to the Chemical National Bank.

This is the original deposit ticket made out by myself at the request of Mr. Edward L. Harper.

THE FIDELITY NATIONAL BANK

When city checks are desposited, name the bank on which they are drawn. When foreign checks or drafts, name the State on which they are drawn.

CINCINNATI, March 2. 1887.

Credit account of E. L. Harper . .	
Currency . . . . .	
Coin . . . . .	
Checks . . . . .	\$300,000."

This \$300,000 was used by Harper for his individual purposes (Rec., p. 73, Q. 106).

There is no evidence that any officer or director of the bank knew of this alleged loan, either at the time or subsequently. There is no reference to it on the minutes of the Board of Directors. Soon after April 1, 1887, the Chemical Bank sent to the Fidelity an account current for the month of March. In that account the Fidelity is credited with March 2, 1887, Tem. loan \* \* \* 300,000 (Rec., p. 67, Q. 48. and Watters' Exhibit No. 10, filed by stipulation of Counsel Oct. 13, 1898) This paper was filed away among the papers of the Fidelity National Bank (Rec., p. 68, Q. 49) and there is no evidence that it was ever seen by any director of the bank except Harper.

Upon the last trial of the case in the Circuit Court, testimony was taken tending to show the custom of banks in borrowing without authority from the Board of Directors, the transmission of reconciliation sheets between the Chemical and Fidelity banks after the transaction of March 2, 1887,

and a general authority claimed by appellee to have been vested in Harper by the method, or want of method, in the management of the Fidelity's affairs by its Board of Directors. There is but slight conflict in the evidence, and its legal effect will be considered in the argument.

## SPECIFICATION OF ERRORS.

The errors assigned are, first, that the Circuit Court and Circuit Court of Appeals erred in finding that The Fidelity National Bank of Cincinnati, Ohio, was liable to the Chemical National Bank of New York, for the \$300,000, or any part thereof, claimed to have been loaned by The Chemical National Bank on the 2nd day of March, 1887.

Second, that the said courts erred in finding that collections, made from collaterals securing said alleged loan by the Chemical National Bank, prior to the declaration of dividends by the Receiver of the Fidelity National Bank, should not be deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical National Bank.

Third, that said courts erred in not requiring the Chemical National Bank first to exhaust its collateral security and apply the proceeds on its claim before proving it against the Receiver for dividends.

Fourth, that said courts erred in not charging the Chemical National Bank with, and deducting from its claim, the sum of \$25,000, which it negligently failed to collect upon the note indorsed by John V. Lewis, and held by said bank as part of its collateral security.

Fifth, that said courts erred in finding that the Chemical National Bank should be paid interest on the several dividends

declared in favor of the creditors of the Fidelity National Bank, from April 25th, 1890, on those declared prior to that date, and from the date of declaration of the dividend on those subsequently declared.

## ARGUMENT.

### I

The first question presented is, whether the Chemical National Bank loaned \$300,000 to the Fidelity National Bank.

We respectfully maintain that the Chemical had no right to loan that sum to The Fidelity on the application of its Vice-President unauthorized by the Board of Directors to borrow; that having undertaken to loan to an agent unauthorized to borrow, the loan was in legal effect to the agent personally, and that the Fidelity is not liable, as it neither received the money nor ratified in any way the transaction.

According to the testimony of Mr. Quinlan, Cashier of the Chemical, the transaction in question was made at the request of Mr. Harper, Vice-President of the Fidelity, in the letter of February 28, 1887, in which he says:

"Enclosed herewith we hand you for credit our certificate of deposit, No. 345, for \$300,000, with bills collateral, as follows: \* \* \* We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since.

"Please place the amount to our credit and advise the rate.

"Respectfully yours,

"E. L. HARPER,

"Vice-President."

(Rec., pp. 17, 18.)

Mr. Quinlan, in his answer to this, says:

"Your favor of the 28th has been received. We credit Fidelity National Bank \$300,000, and shall be considerate as to rate when the loan is paid. I presume that you are aware of the very material change of rates within the past two or three days. Loans for sixty and ninety days on stock exchange collaterals (railroad stocks and bonds), which were ruling at  $4\frac{1}{2}$  percent last week are now  $5\frac{1}{2}$  and 6 percent. I mention this to show you the present condition of the money market." (Rec., p. 29.)

Mr. Quinlan, in answer to the X-Q 160, (Rec., p. 38), says, in reference to certificates of deposit like that sent to the Chemical by Harper:

"I have run over several which we have from the banks, and they are made out in various ways; sometimes made by so and so namely, one of the officers of the bank, but not describing him as an officer, payable to the order of the Chemical National Bank; sometimes they state the Chemical National Bank has deposited so much to the order of W. J. Quinlan, Jr., Cashier; but when these certificates of deposit come, we don't criticise them closely. We virtually care nothing about it; we know their object; their object is, as I have already stated, to borrow money; but not to make it appear on the books as a loan, having the double object in view, to swell their deposits, and not to have to report a loan, and hence we don't criticise the phraseology of the certificates."

And he describes how this transaction was entered on the Chemical books, (Rec., p. 34.)

"Loan No. 1070, March 2, 1887, Fidelity National of Cincinnati \$300,000. Certificate of Deposit Fidelity National Bank \$300,000. Receivable \$326,695.30."

In other places Mr. Quinlan speaks of this being a customary way for banks to borrow money.



Mr. Williams, the President of the Chemical, testifies, (Rec., p. 45, Q. 5.): "Mr. Quinlan and I talked it over, and finally agreed to make the loan." On page 46, Q. 21, he says, "My impression is that he (Harper) had written about a loan at a low rate of interest," and on page 48, Q. 51, "I regarded it (the certificate of deposit) as a loan in the place of a note."

This testimony shows conclusively that the transaction was not a purchase or discount of a certificate of deposit. The certificate of deposit (Rec., p. 19) was in the following form :

CINCINNATI, February 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars (\$300,000) payable to the order of himself on return of this certificate in current funds.

AMMI BALDWIN, Cashier.

\$300,000. Indorsed, "E. L. Harper."

The loan was to bear interest. The certificate bore no interest. The Chemical knew, as admitted by its President and its Cashier, that E. L. Harper had *not* deposited \$300,000 in the Fidelity. He represented the Fidelity as wanting to borrow that amount, not as having it, and no one was misled by this customary and well understood misrepresentation of the Cashier. The proof of claim and petition in this case is based upon a loan of money by one bank to another.

While a temporary loan, or a loan on call, it was expected to continue for sometime. The rate of interest was discussed in the correspondence as a material item in the transaction. Mr. Harper, in his letter, "trusts that you will make the rate as low as you proposed some time since." This shows that the subject of a loan had been the subject of previous correspondence or verbal negotiation. Mr. Quinlan says in

reply, "we shall be considerate as to the rate of interest when the loan is paid," but adds that there has been a material change of rates within a few days; that the rates on sixty and ninety day loans on stock collaterals have gone up from  $4\frac{1}{2}$  to  $5\frac{1}{2}$  or 6 percent. He gives no quotations on temporary or call loans. The collaterals originally sent did not mature until sixty days to four months from that date, and as each piece approached maturity, it was returned to the Fidelity, and replaced by other paper not maturing so soon. The loan did continue without any effort to collect it from March 2 to June 20, 1887, and so far as appears, would have continued much longer, if the Fidelity had not failed. On May 21, Mr. Harper wrote that he would pay the loan July 15, if that were agreeable to the Chemical, and would at once pay the interest up to that date, and so far as appears this arrangement was concurred in by the Chemical. It was, therefore, clearly a loan which was expected on both sides to run for some time.

What then is the law governing the question as to the validity of a loan made to the officers of a national bank without the authority of the board of directors?

A recent case decided by this Honorable Court is full and conclusive on the subject.

Western National Bank of New York vs. Armstrong,  
152 U. S. 346.

The facts in that case are substantially similar to those in the present case and are briefly as follows. By letter of date May 16th, 1887, signed by E. L. Harper without any official designation, he requested the New York bank to make a loan of \$200,000 and to place the amount to the credit of the Fidelity Bank. Four notes, made by one A. P. Gahr to E. L. Harper and indor-ed by him, together with certificates for

1600 shares of the capital stock of the Fidelity Bank, were inclosed in the letter. The \$200,000 was placed to the credit of the Fidelity on the books of the New York bank and was drawn out partly by Hopkins the assistant cashier, and partly by Harper himself, by drafts in the name of the Fidelity Bank but did not in fact come into the actual use and possession of the Fidelity Bank otherwise than by being deposited to its credit in the New York Bank and by being checked out by drafts signed by the proper officers in the same manner as other deposits are usually drawn out. It was claimed on the part of the New York Bank that the loan was in fact, as their officers understood it to be, a loan to the Fidelity and suit was brought in equity against Armstrong, Receiver, on that theory. For the Fidelity it was claimed that the loan was to E. L. Harper personally, and that the transaction was a discount of the Gahr notes.

Mr. Justice Shiras, pronouncing the opinion of the court, says:

"There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York Bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action, and having accepted and enjoyed the proceeds of the discount."

"There is no evidence whatever that the Board of Directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum for so long a time."

"The most that can be claimed in this case, is that Harper acted as the principal executive officer of the bank. It

can not be pretended that as such he had power without authority from the Board to bind the bank by borrowing \$200,000 at four months time."

"It might even be questioned if such a transaction would be within the power of the Board of Directors."

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transaction would be so much out of the course of ordinary and legitimate banking, as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the Board of Directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the Vice-President, however general his powers, could not exercise such a power unless specifically authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow the money, and that the bank can not be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is in the present case, the Board of Directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record, that the Board of the Fidelity National Bank, by any act formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction."

Can this case be distinguished from the one at bar? Not, we respectfully submit, so far as the right of E. L. Harper to bind the Fidelity without the action of its Board of Directors is involved. It is true that in the case now before the Court, Harper *assumed* to borrow on behalf of the bank. But in the case cited the Court waive the issue upon that point as

immaterial, and without deciding whether the form of the loan was that of a loan to Harper or a loan to the bank, assume for the purposes of the argument that Harper intended to borrow for the Fidelity and that the New York Bank intended to loan to the Fidelity. The whole reasoning of the Court is applicable to that hypothesis only. If the Court had found that by the terms of the contract as shown by the correspondence the loan was to Harper personally, there would have remained nothing to reason about. The conclusion of the Court is clear and distinct (*italics ours*) "we think it evident that Harper had no authority to borrow the money, and that the bank cannot be held for his engagements, *even if made in behalf of the bank*, unless ratification on the part of the bank be shown."

In both cases, Harper was vice-president of the bank. In neither case was there any action of the board of directors. Independently of ratification, he had the same authority in one case as in the other.

Nor does the form by which the loan was obtained constitute any legal difference in the cases. The law would do a vain thing in protecting banks against the unauthorized acts of their officers, if the officers by adopting any form, *thoroughly understood by the lender as a form*, can accomplish their unlawful purposes. Cashier Baldwin, who signed the certificate of deposit enclosed by Harper when he borrowed the \$300,000, had no more authority to borrow than Harper had. The acts of both had no more validity than the acts of either alone; and as the President of The Chemical Bank (Rec., p. 45, Q. 5) and the Cashier (Rec., p. 38, X Q. 160) both knew exactly what the certificate of deposit meant, it has no legal significance in this case.

The differences in fact claimed to exist between the present case, and that of the Western National, are:

1. In the case of the Western National, the loan in question was the initial transaction between the two banks. In the present case there had been previous transactions between them. As none of these previous transactions were loans of money, we can not see how other transactions which were perfectly proper can legalize an illegal one.

2. In the case of the Western National Bank, the request for a loan by the Fidelity was not made by Harper signing his name as an officer of the bank. That is true, but the whole letter from Harper referred to the business of the bank, and the acceptance was directed to him as Vice-President. It was argued by the counsel for plaintiff that the whole correspondence and testimony proved that it was a loan to the bank. The Circuit Court did not hold that Harper did not apply for a loan for the bank, or that the answer did not propose a loan to the bank. It held that the transaction was a discount of paper not endorsed by the Fidelity, and that, therefore, it was not liable, and the decision of this court takes it for granted that Harper professed to be acting for the Fidelity, and that the Western understood him to be so acting.

3. It is claimed that in one case, it was a time loan, and in the other, a loan on call. The loan in the present case was as much a time loan as the other. Both were substantially time loans. That fact, however, makes no difference in fixing the illegality of the transaction.

4. It is claimed that there was a written obligation of the bank in one case, and not in the other. No written obligation is necessary in borrowing money. In the case of the Western, it was claimed that the loan was effected by correspondence; in the present case by correspondence, and the certificate of deposit accompanying the request for a loan.

The law governing this case seems so clearly defined by this Court, that it seems useless to take further time in citing cases to sustain it, and we submit that the facts in this record bring the present case clearly and unequivocally within the principles thus settled. This was a loan of \$300,000, a larger sum than is pronounced by that opinion as "enormous," and as "beyond the authority of any officer of the bank to borrow." While termed a loan on call, it was a time loan in all its characteristics.

Being such, it was beyond the authority, if not of the Board of Directors, at least of any officer of the bank without the special authority of the Board of Directors to make. Harper had no such authority. Aside from the point that it is incumbent on the other side to prove such authority affirmatively, and that there is not a shadow of such proof, all the facts contradict the existence of such authority. The secrecy with which the thing was done is wholly inconsistent with such authority. The letter enclosing the certificate, and the one subsequently sending new collaterals, were not copied in the letter book of the bank. The collaterals, so far as they belonged to the bank, were forwarded without any entry of the fact being made on any book of the bank. The certificate of deposit was not entered on the books. The stub of the certificate of the number so sent—345—was marked cancelled, so that no such certificate would have appeared to have been issued by any one examining the books. The funds were immediately transferred to Harper, so as to give the matter the appearance of his private transaction. These and other facts of like character are wholly inconsistent with the idea that the Directors had any knowledge of the fact, or in any way authorized it. (Rec., p. 65, QQ. 25, 31, 32; p. 66, QQ. 37, 38, 39.)

There is another fact connected with the case showing

that the transaction was not in the regular course of banking business. The whole transaction was based on the certificate of deposit No. 345. This certificate was that E. L. Harper had deposited three hundred thousand dollars in the Fidelity National Bank, payable on demand to the order of himself on the return of that certificate. This was not true. He had deposited no money of the bank as a basis of the certificate. It was a fraud upon the bank to have issued it. It was not in the course of regular banking business. And this must have been known to the officers of the plaintiff bank. They did not believe that E. L. Harper had made any such deposit; or that said certificate stated the truth. Neither the President, nor the Cashier, in his testimony, claims that he believed it stated the truth; but claimed that other banks had done the same thing for the purpose of borrowing money. The President (Rec., p. 46, Q. 22) testified that he supposed the certificate belonged to the bank. If properly issued, it could only have belonged to the bank by being paid, and if paid it was of no use to any one else. He further says that he supposed it represented a loan. It seems a waste of words to argue that no such presumption was possible from the papers. The Cashier's testimony, on pages 38 and 39 is equally unsatisfactory. If the officers of the bank knew that this certificate stated an untruth, and that it was so issued merely for the purpose of borrowing money, it must be charged with notice of the subsequent use of the money obtained by the use of this paper.

It is claimed on behalf of the Chemical National Bank that the testimony does not show affirmatively that Harper had not, on deposit to his credit in the Fidelity, \$300,000, at the date of the certificate, and the court is asked to presume that the certificate was what it purported to be. In the face of the testimony above cited, such a presumption would be a



violent one. As the officers of the Chemical knew that the Cashier issued that certificate merely for the purpose of borrowing money, to presume that the \$300,000 was in the bank would be a more violent presumption in favor of the Cashier's authority than to presume action by the board of directors. Such presumptions are not indulged in favor of acts beyond the apparent scope of authority of the officers.

In *Farmers and Merchants National Bank vs. Smith*, 23 C. C. A. 80, the Circuit Court of Appeals in the Eighth Circuit held that a bank is not liable where its cashier sold a note and mortgage as a broker, and guaranteed payment as cashier. Judge Thayer says, p. 86, "But when the transaction, in which the bank is for the time being engaged, is known to the person dealing with it to be outside the legitimate sphere of its operations, no reason is perceived why a person, dealing with the cashier under such circumstances, should be allowed to indulge in any presumptions as to the cashier's authority. He is advised that, by the very nature of the transaction, all acts done and performed in relation thereto are beyond the power of the corporation, and, if he expects to hold the corporation liable on any contract or obligation entered into by the cashier, or other officers, in the course of that transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body."

We think, therefore, it is perfectly clear that this loan is invalid as to the Fidelity National Bank, unless it has been legally ratified, or there are such facts as will amount to a legal ratification.

The learned judge who pronounced the opinion in this cause in the Circuit Court of Appeals, held that sufficient authority was conferred upon Harper by the custom of banks

generally, in Cincinnati and New York, to permit their executive officers to borrow money on behalf of their banks, and that such custom was proven by the testimony. Also, that the conduct of the directors of the Fidelity Bank, in neglecting their business and practically permitting Harper to manage its affairs conferred upon him sufficient authority to borrow the \$300,000.

We respectfully submit in the first place that the testimony does not show that any such general custom existed.

First, of the Cincinnati bankers,—

M. M. White, of the Fourth National states that he knows what is the custom of his bank,—they did not require a resolution of the board of directors of the borrowing bank to authorize the executive officer to borrow money. He, however, testifies that only on one occasion did he borrow money for his bank, and then a record of it was made in the proceedings of the Directors' meetings. (Rec., p. 145, Q. 10.) He says vice-presidents are not usually active in the management of the bank. (Rec., p. 145, Q. 12.)

Mr. Goodman says, "If they (another bank) had required a loan on their own account, we would have required a resolution of the Board of Directors." (Rec., p. 161, Q. 11.)

W. S. Rowe, of the First National, testifies that it was not customary to require a resolution of the Board of Directors, but they took the note of the bank, with municipal bonds or other good bonds as collateral. (Rec., p. 162, Q. 10.)

H. C. Yergason, of the Merchants National, testifies that they discounted bills receivable of other banks, but did not require a resolution of the board of directors of the borrowing bank. When his bank borrowed money, he always consulted the Board of Directors and obtained their approval. (Rec., p. 169, Q. 7.)

Mr. G. P. Griffith, of the Citizens, says it was customary

to make loans when requested by the officers of the bank; but "the institutions with which he was connected have never made a loan to a bank except when secured by securities such as county bonds, U. S. bonds or other good and sufficient securities." They never borrowed of other banks, though they have put up their government bonds and drawn against them. (Rec., p. 171, X Q. 2.)

J. D. Hearne, of the Third National, testifies that it was not customary, before the decision of the Supreme Court, to require a resolution of the board of directors of the borrowing bank before lending it money. Such loans were made by discounting the commercial paper of the borrowing bank, or direct loans; and, in the latter case, they would generally put up their bills receivable or other collateral to secure the loan. Mr. Hearne had borrowed money for his bank, and says, "we consulted with the Board of Directors when we borrowed money for the bank." (Rec., p. 175, X QQ. 2-6.)

This is all the testimony offered as to the custom in Cincinnati. We submit that it wholly fails to sustain such a custom here. There are six witnesses; three of them—White, Yergason and Hearne—had borrowed money for their respective banks. They swear that they always consulted the Board of Directors before doing so. Goodman testifies that he would not loan money to a bank, before the decision, without a resolution of the Board of Directors. The other two, Rowe and Griffith, speak of the custom and powers of the officers, but neither ever borrowed money for his bank. All testify that when such loans are made, they are made upon collaterals—upon government or other bonds, or the commercial paper of the borrowing bank. No better evidence of the doubt of these gentlemen as to the right of the banks to borrow money could be adduced. When these witnesses represented borrowing banks, they required the

authority of the board of directors; when they represented the loaning banks, they required collateral from which the debt could be realized without calling upon the responsibility of the bank itself. If the custom in Cincinnati is to prevail, as we submit is the case, the testimony offered sustains the opinion of the Supreme Court. It certainly does not show that it has been the custom for bank officers to borrow money without consulting the Board of Directors. Of all the witnesses examined, the two who are specially autocrats in their respective banks,—certainly as much so as Mr. Harper was in the Fidelity,—Mr. M. M. White and J. D. Hearne, had the approval of their boards when they borrowed money.

From New York, the witnesses on the subject of the custom are the President and Cashier of the Chemical Bank and five others—Clark, of the American Exchange; Hepburn, of the Third National; Townsend, of the Importers and Traders; Baker, of the First National; and Tappan, of the Galatin. They all testify to the custom of officers of National banks loaning money without requiring the authority of the directors of the borrowing bank. Not one of these gentlemen ever borrowed a dollar for his bank. They are all lenders, and they never required a resolution of the board of directors to be furnished. Being lenders, they endeavor to confirm their own acts by their own testimony to sustain the loans which they made; and, even after the decision of the Supreme Court of the United States, to claim their views upon this question to be superior to that of the highest court in the land. Not one of them testified that the borrowing was done without the authority of the board of directors of the borrowing bank.

Mr. Quinlan, page 109, after testifying to the custom to make such loans, says they were usually made "on bills re-

ceivable, frequently receiving a certificate of deposit, and the receivables securing the certificate or loan; the certificate of desposit taking the place of a note, because the Comptroller of the Currency had for some years held that a national bank could not give a note, except its circulating notes."

He is then asked (Rec., p. 109):

Q. 13. "And it was to get around that decision that you adopted the plan of a certificate of deposit?"

A. "Excuse me. We didn't adopt the plan. The borrowing bank adopted the plan."

Q. 16. "You knew that the certificate of deposit was intended to represent a debt of the bank to the loaning bank?"

A. "We supposed this. We knew nothing whatever; but we supposed this, that in order to avoid re-discounts, the borrowing bank issued this certificate of deposit, which fulfilled two purposes—it increased their deposit line, which would be showing strength, and it did not appear as a re-discount or a loan."

Mr. Williams testifies (Rec., p. 115.):

Q. 11. "Why did your bank take a certificate of deposit?"

A. "A great many banks borrowing money wish to avoid the fact appearing in the statements that they are borrowing money, and a certificate of deposit appears among their liabilities as deposits. That was the reason, and is the reason why a great many banks borrow money on a certificate of deposit, secured by collaterals, rather than borrow on their own note, or on bills receivable. In that way nothing appears in their public statement showing that they are borrowing banks."

Dumont Clark testifies to the custom, and says in regard to the evidence of indebtedness, it was customary to take "Simply the paper which they had discounted with the endorsement of the bank upon its back; at other times we

would take a collateral note made by the bank ; at other times a certificate of deposit made by the bank ; in the last two cases collaterals would be attached to such instruments.”  
—(Rec., p. 118, X Q. 2.)

Mr. Hepburn testifies as to the mode of making such loans :

“Loans were made upon a note—a collateral note—either time or demand, with the bills receivable of the borrowing bank as collateral, with the usual margin of twenty or twenty-five percent; also by discounting the receivables of the bank direct by placing the indorsement of the borrowing bank upon the same, and having the proceeds placed to their credit at the agreed rate of discount. Money was frequently borrowed also upon certificates of deposit upon a bank with the receivables of the bank put up as collateral for it. This was one of the forms of borrowing which was open to more or less criticism, and was made a subject of criticism by myself as supervising officer.

“The objection to borrowing upon a certificate of deposit, was that the banks borrowing money frequently reported the proceeds of their loans as deposits instead of bills payable, which, instead of evidencing their weakness by reporting bills payable, they advertised the public confidence in them by increasing the amount of their deposits.” (Rec., p. 120, X QQ. 1, 2.)

Mr. Townsend testifies that such loans took the shape of the indorsement of the bank by one of its officers, with notes and rediscount of their bills occasionally, but not often certificates of deposit. (Rec., p. 130.)

Mr. Tappan says :

“In the majority of cases with us, the borrowing bank usually rediscounts paper, or puts up some security with the bank.” (Rec., 133, X Q. 6.)

It will be noticed that the question put to all of these witnesses was :

Did the lending bank prior to that decision ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the Directors, authorizing a loan ?

Not one of the witnesses testifies to the bank he represented, ever borrowing money, or any knowledge of what was actually done by the officers of the borrowing bank. It may be that had the officers of the borrowing banks been called, the result might have been similar to that in Cincinnati; that they would not have assumed to borrow money without the authority of the Board of Directors. The situation at the two ends of the line was wholly different. At the lending end, collaterals were required sufficient to make the lender safe without looking to the responsibility of the bank. It held in its own hands the purse string from which it could pay itself; and it cared little whether the officers acted legally or not. But why was the question confined to the time prior to the decision of the Supreme Court? If the custom makes right, notwithstanding the decision, the right will continue as long as the custom prevails. Two of the New York witnesses are correct if the claim is valid. They testify that they have paid no attention to the decision, but act since the same as they did before. But we submit that no such custom has been proven, as can set aside the decision of the Supreme Court.

The whole testimony of the New York bankers shows a looseness in their mode of making loans—an autocratic claim of authority in the executive officers of national banks that makes the decision in the Western National Bank case timely and salutary. It is time that some limit should be placed to their powers. It is time that the Board of Directors should

be compelled to perform their duties, and manage the national banks as the law intended they should. Scarcely a failure of a national bank has occurred that has not been occasioned by the acts of the executive officers in indiscriminate loans and use of its funds, which would not have occurred if the Board of Directors had performed its duties.

We respectfully submit that such testimony can not make that legal which the highest court in the land has declared to be illegal.

The contention is, and the testimony was offered for the purpose of proving, *not* that the borrowing bank permits its officers to borrow without authority given by its Board of Directors, but that it is not customary for the lending bank to require such executive officers to *exhibit their authority*. In other words, the claim is, that the executive officers, duly authorized by the Boards of Directors to borrow, have been trusted so long and so uniformly by the lending banks without exhibiting their credentials that the lending bank has now a legal right to assume that the executive officer has been duly authorized to borrow by the Board of Directors, whenever he applies for a loan. Clearly, the custom was illegal in its inception. The first lending bank that omitted the precaution of asking for the special authority could not have recovered the loan if the authority had been wanting. How long, we respectfully ask, does it take for lending banks to extend the authority of limited agents in this manner? How are banks, that do not need any money and do not wish to borrow any, to protect themselves against this extraordinary power bestowed upon their agents by designing banks that have capital to loan in large amounts? Here was a Vice-President, not usually an active officer as the testimony shows (Rec., p. 145, Q. 12), and whose activity was entirely unknown to the Chemical bank, so far as the testimony dis-



closes, trusted without any actual authority and without being required to show any. If this theory of the law is correct we see nothing to prevent sellers by custom extending indefinitely the limited power of the agents of buyers. It is a dangerous doctrine that permits one class to establish a custom affecting the rights of an adverse class.

In view of the decision of this Court in *The Western National Bank vs. Armstrong* above cited, it seems idle to discuss the question further, or to consider the cases in which this authority was attempted to be sustained, or to discuss the question whether the evidence of custom given in this case is to be the basis of the special authority required by the decision and the law. It is simply placing the views of certain bank officers as to their authority above that of the Supreme Court. It is to fritter away and annul the force of that decision; to destroy the benefits which must follow that decision, by which it was intended to stop the headlong course of irresponsible officers from wrecking their banks by exercising powers not belonging to them, and bringing loss and bankruptcy upon the stockholders whom they are elected to serve. How can the evidence of officers, who according to the Supreme Court, have acted illegally, be made the means of legalizing those very illegal acts?

To show how little force should be given to this testimony, we desire to call the attention of the court to the admissions made by several of these witnesses. It will be remembered that the present loan was made upon a certificate of deposit made by the Fidelity to the order of E. L. Harper. This certificate represented that Harper had deposited in the Fidelity \$300,000, which would be repaid upon the return of the certificate; that the bank had in its vaults that much money belonging to Harper, and on the faith of that document the loan was made. This paper, on its face, belonged

to Harper. Why should the bank borrow money when it had the money in its vaults? Harper might desire to cash the certificate, and he acted on the theory that it was his, and that the money loaned in this case was on his property. This would be the natural inference from the paper to one not initiated into the secrets of banking. But again custom comes in, and the same bankers testify that they regarded this as the note of the bank. It was customary to treat it as such. Why was this custom adopted? Mr. Hepburn explains it: They, instead of "evidencing their weakness by reporting bills payable, advertised the public confidence in them by increasing the amount of their deposits." In other words, by borrowing money in this way they represented to the Comptroller of the Currency, and to the public, that they had increased their money in bank, and had not increased their liabilities. This procedure was a fraud upon the department and the public, but is announced by the same witnesses as to custom as a regular and legitimate mode of banking sustained and legalized by custom.

It is time that banking should be governed by law, and not by what bank officers think their positions and powers entitle them to establish as fixed custom.

We respectfully submit that the opinion of the learned Judge in the Circuit Court of Appeals on this subject is not in accord with the claim of counsel for the Chemical Bank. While they undertook to show a custom of lending banks not to require the executive officer of the borrowing bank to exhibit his authority, the learned Judge appears to hold that the custom dispenses with the necessity of any authority from the Directors. Counsel argue that, as no authority is required to be exhibited by custom, the Chemical Bank had a right to rely on such custom and act without any exhibition of authority. Of course, in that case it would

be immaterial whether there was any authority or not. The Court argues that if the Directors could authorize the executive officer to borrow by resolution of the board, they could authorize him to borrow by acquiescing in a well-known usage. It is certainly true that authority can be conferred by acquiescence, but it is difficult to see how the Directors can by non-action ratify authority attempted to be conferred on their agent *by the party with whom he was undertaking to deal*. An agent derives his power from the principal, not from the adverse party with whom his principal is dealing.

It is next insisted that the Board of Directors, by neglecting their duties and permitting Harper to manage the affairs of the bank without supervision, delegated sufficient authority to him to render the transaction valid.

However negligent the Directors may have been in permitting Harper to usurp their authority, there is no evidence to show that the Chemical Bank at the time of the loan had any knowledge of such usurpation. It is not pretended that the Chemical in making the loan *relied upon* any apparent authority conferred by the Directors. The Directors themselves are but officers of the bank, and wronged the bank if ever they permitted Harper to do an act they should have done themselves. The bank should suffer the consequences of authority impliedly conferred upon Harper by the wrongful conduct of its Directors when innocent parties have been misled by such conduct, but why extend the punishment further? The Chemical Bank did nothing but what it would have done had the Directors always exercised the most careful supervision over its affairs. The conduct of the Directors conferred no *actual* authority on Harper especially in a matter where the personal judgment of the Directors was required.

In the case relied upon by the learned Judge in the Circuit Court of Appeals, *Martin vs. Webb*, 110 U. S. 7, Mr. Justice Harlan, speaking of the implied authority of a Cashier, says, "When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, *in good faith, deal with it upon the basis* of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." (Italics ours.)

It is not claimed in the present case that the Directors specifically ratified the making of the loan, or that any one of them knew that it had been made. Nor does the plaintiff show any such conduct of the Directors from which authority to borrow this money can be implied. It is not shown that money had been borrowed by Harper, prior to this time, and with the knowledge of the Directors.

All of the present living Directors, except Harper, have been examined by one side or the other—four in all. They testify that they never heard of the loan until after the failure of the Fidelity. Messrs. Gahr, Pogue, Matthews and Kineon all testify that they had no such knowledge until after the failure, except Gahr, who heard from Harper, three or four days before the failure, that he had made loans from Eastern banks. No Director testifies that he knew or had heard of any such loans.

Mr. Hinch says that Harper dictated as to all the operations of the bank, but immediately confines that as to what should be held over as cash items, as that was all that came under his jurisdiction. Mr. Kineon testifies that Harper did everything; that he ran the whole bank; Mr. Kineon made efforts, he says, to have the loans examined, but wholly failed, and sold his stock to Harper, and stepped out. He

did object to the mode in which the business was managed, and discussed it with Mr. Swift, the President, but it was all in reference to loans of the bank funds by Harper. No question was made as to Harper borrowing money.

Mr. Alter testifies in almost identically the same manner. He testifies that he was refused access to the call loan account, and in consequence he resigned.

A. P. Gahr testifies that the stock which he held belonged to Harper, and, that so far as he knew, the transactions in the way of loans and discounts were not submitted by Harper to the Directors.

Mr. Matthews testifies that he always spoke to Harper about the business with the bank, which referred to discounts for Swift's Iron and Steel Company, and carrying checks of that Company in the drawer as cash.

Mr. Pogue testifies that possibly Harper was the managing man of the bank. Swift, the President, was there daily, except when absent on vacation. There was a Committee on Loans, and reports on loans and discounts were made to the Directors. This testimony only shows that Harper was the general manager of the bank. It shows further that the matters in which he acted without consulting the Board, and about which complaints were made, were as to the loans and discounts. These were all matters which, according to the Supreme Court, belonged to the business of banking, and about which the officers had authority. There is not a syllable of testimony from anyone that any Director knew of Harper borrowing money in the name of the bank—of permitting him to borrow money—so as to give an implied authority, as far as the Directors could do so, to borrow money.

In the case of the Western National Bank, it was testified that Harper was the Vice-President and managing officer,

and that by this the witness meant that Harper was "the general manager of the business of the bank," but this Court says, after quoting this testimony, that "it can not be pretended that as such he had power without the authority of the Board to bind the bank by borrowing \$200,000 at four months' time."

There is no evidence that the Board of Directors knew at any time that Harper was borrowing money in the name of the bank, either before or after the case now before the court. There is not a fact brought to the knowledge of any one of the Directors in the testimony which should have led him to suppose that Harper was borrowing money for the bank. There was great confidence placed in him. There was a knowledge that he was making loans and doing other acts of his own will, but they were all in matters belonging to the legitimate banking business. Such knowledge can not bring home to them a suspicion even that he was engaged in acts outside his legal powers and illegitimate in banking business.

The effect of the testimony on this subject is to show that the Directors neglected their duty in not looking into the business *which Harper had a right to do*. It was not necessary for them to act in order that a loan of the bank's funds by Harper should be valid, but it was their duty to see to it that Harper did not lend the money recklessly. How a failure to supervise the business that he had a right to transact can confer upon him authority to transact business which required *their action* is not apparent. Still less apparent is it how the Chemical Bank can be justified in assuming that the Directors had delegated their authority to him when it did not even have notice that the Directors were neglecting any part of their duties.

Let us look for a moment at the authorities upon this

question, so as to know definitely what is necessary for the ratification of an unauthorized act.

Meacham on Agency, Section 129, says :

"It may, therefore, be stated as a general rule, that except in those cases where the principal intentionally assumes the responsibility without inquiry or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

"If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act the ratification will be invalid, because founded upon mistake or fraud."

And in Section 148:

"It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another on his behalf, must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole. But here, as in other cases, it is indispensable that the principal should have the full knowledge of the material facts, or that he should intentionally have accepted the benefits without inquiry, otherwise the receipt and retention of the benefits of the unauthorized act is no ratification."

Morse on Banking, Section 101, says:

"Any act done avowedly for the bank may be adopted with full actual knowledge of the facts, so as to have the *same effect as if previously authorized by the same power which ratifies.* \* \* \* \* \*

"If the directors or a majority of them know actually, not constructively of the contract and acquiesce, it is a ratification without any vote."

"It is a well settled rule that a ratification by the principal of the unauthorized acts of the agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon the ratification to prove that the principal, having such knowledge acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence."

"It is incumbent on the plaintiff to show that the directors, or at least a majority of them, knew of the contract, and its terms, and that with such knowledge they acquiesced in and adopted it."

"So where the cashier of a bank had been carrying on transactions with the bank contrary to its rules, for his own benefit, it was held that the fact of such transactions having been entered on the books of the bank, did not import knowledge on the part of the directors and consequent ratification."

*Wheeler vs. Northwestern Sleigh Co.*, 39 Fed. Rep. 347:

"Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of the stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other prop-



erty than the stock as the consideration of the money paid by the purchasers, and received by him. Under such circumstances, the retention of the money can not be held to be a ratification by him of the unauthorized acts of the agent because it was retained without knowledge of the facts."

*Smith vs. Tracy*, 36 N. Y. 79:

"In the case before us, it is claimed that the receipt by the testator of the proceeds of an unauthorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others, clothed with limited powers, and occupying strictly fiduciary relations."

*Baldwin vs. Burrows*, 47 New York, 199:

"The receipt even from an agent of money paid him on a contract, would not bind the principal to the contract, unless he knows on what account the money was received, and the terms of the contract."

"The mere fact that the proceeds of a contract made by one person in the name of another, without authority or a portion of them, have come into the hands of the latter, is not of itself sufficient to render him liable on the contract. To have that effect, the proceeds must be received not only with knowledge, but under such circumstances as to constitute a voluntary adoption of the contract. When goods are purchased by one assuming without authority to be the agent of another, if the latter knowingly received the goods so purchased as his *own property*, this will amount to a ratification of the agency. But if he denies the authority of the pretended agent to act for him, or having knowledge of his acts, and afterwards receives the goods as the property of the assumed agent in payment of a debt due from him, it will not amount to a ratification."

In *Phosphate of Lime Co. vs. Greene*, L. R. 7 C. P., page 55, Justice Welles says :

"If the act done be unauthorized, the law makes it absolutely void at the election of the persons on whose behalf it is done, so that he may repudiate it, or take the benefit of it, as he chooses ; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent, or do some act, before he declares it to be void. It comes round, therefore, to this alternative ; either the defendants must establish that the directors had authority at the time, or that the company did, by their subsequent conduct, assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority."

Page 56 :

"The principle by which a person on whose behalf an act is done without his authority may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition ; in order to make it binding it must either be with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances."

And in *Combs vs. Scott, et al.*, 12 Allen (Mass.) 493, the Court says :

"Ratification of the unauthorized acts of one who assumes to be an agent, in order to render them binding on the principal, must have been made with full knowledge of all material facts, and ignorance of such facts, whether it arises from want of inquiry by the principal and neglect to ascertain the facts, will render an alleged ratification ineffectual and void."

In *Thatcher vs. Pray*, 113 Mass. 291 : Thatcher left a horse with one Gray for safe keeping. Gray, without authority, sold the horse to the defendant, and received for it a

check for \$100. Thatcher had a claim against Gray for potatoes sold to him, and Gray forwarded to him the defendant's check which the latter had given him for the horse, to be credited to his account, and the plaintiff received the check and credited it on account of the potatoes, having no knowledge at the time that his horse had been sold.

"Held that the plaintiff's receipt and collection of the check were not a ratification of the sale, and that he had a right to appropriate the check to the extinguishment of the debt in payment of which it was given to him."

In *Bohart, Dillingham & Co. vs. Oberne, Hosick & Co.*, 36 Kansas, 284, it is held :

"Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to ratify in part a liability existing against the agent, and in their favor such receipt and retention will not amount to an adoption and ratification of the unauthorized contract "

In *Schutz, and others, v. Jordan, and others*, 32 Fed. Rep. 55, decided by Justice Wheeler, the defendants, who were merchants, discovered that their superintendent was inclined to carry more goods in a certain department than was desirable, and directed him to keep down the stock; the salesmen of plaintiffs called to sell more goods in that department, and was informed of this direction, but the superintendent agreed that they might send more goods if they would not have any statements of account or dunning letters sent to the house. This scheme was communicated to the plaintiffs, who assented to it, and afterwards sent large quantities of goods to the house, which were received by the superintend-

ent, some of the bills paid by his direction, and many of the goods sold in the usual course of trade. When the defendants discovered what had been done, they laid out all the goods received from plaintiffs, in order to ascertain if any of them were goods which had not been paid for, but were unable to determine this, and the goods were then put back in stock and sold.

“Held that the defendants did not ratify the unauthorized act of the superintendent by retaining and selling the goods after discovery, and that the plaintiffs could not recover the price of them.”

*First National Bank of Burlingame, v. Hanover National Bank of New York*, 66 Fed. Rep. 34: Sheldon was the President of the First National Bank, of Burlingame. At his request, the First National Bank, of Hanover, discounted his note for \$5,000 under an alleged agreement that if not paid at maturity, it should be charged to the Kansas bank. The proceeds of the collection by Sheldon's direction were placed to the credit of the Kansas bank. Thereupon, Sheldon directed the proceeds to be charged to the New York bank, and credited to himself. The note not being paid, it was charged to the Kansas bank. Upon these facts the court below charged the jury as follows:

“If you find, from the evidence, that there was originally a defect of authority upon the part of the parties to this transaction, and if you further find that the defendant bank retained and enjoyed the proceeds of the transaction made by Sheldon, that would constitute acquiescence, as effectual as the most formal ratification afterwards, and the defendant, if you find that to be the case, would be estopped from resisting the demand of the plaintiff here. That is a matter for you to determine from the testimony, for upon the question of authority the testimony is conflicting, and you must determine it for yourselves.”

The Circuit Court of Appeals held:

"An exception was taken to this portion of the charge on the ground that there was no evidence tending to show that the defendant bank received and had the benefit of the loan in controversy. We think this exception was well taken. We have stated the only evidence the record discloses on this subject, and from it clearly appears that the Kansas bank was used by Sheldon as a mere conduit through which to pass the proceeds of the discount from the New York bank to himself. Just as soon as he learned that the New York bank had credited the Kansas bank with this money on its books, he caused it to be charged to the Kansas bank (should be New York bank), and credited to himself on the books of the latter, and he used it. The Kansas bank neither retained nor enjoyed the proceeds of this discount; nor did it receive any interest, commission, or other benefit from the transaction. As there was no evidence that it retained or enjoyed the proceeds of this discount for the jury to consider, the instruction that such intention and enjoyment might work an estoppel of the right of the bank to question the authority of its officers to charge it with the liability in issue obviously tended to mislead the jury."

The proceeds of the loan in that case were enjoyed by the Kansas bank precisely in the same way as the proceeds of the loan in the present case by the Fidelity. It was checked out by the Kansas bank in its regular business, just as was done by the Fidelity Bank in this case.

To the same effect is the case of *State National Bank vs. Newton National Bank*, 66 Fed. Rep. 694, in which the Court says:

"That the proceeds were received and used by the investment company and not the Newton bank; that they were placed to the credit of the Newton bank on the books merely as a convenient mode of transmitting the same to the investment company."

Here, too, it was a question of the authority of the cashier to make the contract, and it was claimed the reception of the money by the bank was a ratification of his act.

And in the Western National Bank case, the Court says:

“The mere placing of the money in the name of the Ohio bank involved no ratification by the bank, unless it was so placed with their knowledge and assent; nor did the withdrawal of the money by drafts, drawn by Harper or by his direction in the name of the bank, constitute a receipt by the bank of such money, unless it was in point of fact received and used by the bank for its benefit.”

How do these authorities apply to the present case, and what questions involved here do they settle?

1. The loan was an unauthorized one, and therefore not binding on the bank.
2. The crediting of the proceeds of the alleged loan by the Chemical on its books to the Fidelity, does not, of itself, make the latter liable.
3. Whatever acts may be claimed to amount to a ratification of the loan, must be shown to have been done by the Directors of the bank, with a full knowledge of the facts.
4. If the Fidelity was merely used as a conduit through which to pass the proceeds of the loan to Harper, and those proceeds were taken by him, there was no reception or enjoyment of the proceeds by the Fidelity.

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The third ground upon which the Circuit Court of Appeals distinguishes this Case from the Western National Bank vs. Armstrong, 152 U. S. 346, is in what is claimed to be a ratification of Harper's unauthorized transaction by the Fidelity Bank, especially by not taking notice of informa-

tion on the subject of the loan conveyed by accounts transmitted to the Fidelity Bank by the Chemical.

The substance of this claim is, that the Chemical, by sending a statement of its account to the Fidelity, gave it information in regard to the loan, of which it was bound to take notice; that the monthly statement of the account for March, 1887, as it stood upon the books of the Chemical, transmitted by that bank to the Fidelity, was notice to it that Harper had undertaken to borrow \$300,000 for the Fidelity, and that by acquiescing in that statement the Fidelity Bank ratified the loan.

The only knowledge claimed to have been brought home to the Fidelity of this loan, was the letter of March 2, 1887, (Rec. p. 29) and the account of April 1st, containing the credit as a "tem. loan" of the \$300,000. (Watters' Exhibit, No. 10, p 1.) This account was handed to Watters, examined by him, and filed away (Rec. p. 68 Q. 49), and there is not a particle of evidence that the letter was ever seen by any Director except Harper, nor the account by any person except Watters, and probably Harper. Knowledge of these transactions by Harper is not the knowledge of the bank.

*American Surety Co. vs. Pauly*, 170 U. S. 133.

Mr. Justice Harlan, delivering the opinion of the court, says: "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends, or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declaration of the agent unless it be proved that he had at the time actual

notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

In the present case, Harper, possibly with the assistance of the Cashier, was engaged in fraudulent practices, and robbing the bank. His knowledge of the transaction through which he was effecting this robbery, was not the knowledge of the bank or of the Directors. The inference is that he would not inform the Directors of such transactions, and the evidence in the case shows that he did conceal everything relating to this matter from them. It is shown that the account of April 1st was never shown to the Directors. The credit on the Fidelity books, had they seen it, did not indicate a loan. How then would the sending of this account, with those two words on it, notify the Directors, who never saw it and who would not be expected to examine the accounts between the Fidelity and other banks, that Harper had borrowed \$300,000 in the name of the bank. It is not enough to show that it was the duty of the Directors to have known what was in these accounts, or that they would or might have known it if they had performed their full duties. Knowledge must be brought home to them actually, and not constructively, before ratification by them will be held as against the bank. The following case is in point on this question:

*Murray vs. Nelson Lumber Co.*, 143 Mass. 251.

The Court below instructed the jury as follows:

"But all directors of a corporation are presumed to know what it is their duty to know, what they are able to know, and what they undertook to know when they accepted the responsibility of directors, and a jury have the right to suppose that the directors of a corporation have knowledge of its concerns. In the absence of direct and positive evidence of the knowledge of the directors, jurors have a right to assume



that they are doing what they are appointed to do, and that they know what they are appointed to know."

Held, that these last instructions were erroneous.

And the Court further says:

"In the case at bar, therefore, it was incumbent on the plaintiff to show that the Directors, or at least a majority of them, knew of the contract and its terms, and that with such knowledge they acquiesced in and adopted."

Is there any evidence that the directors of the Fidelity knew that this money had been borrowed by Harper for the bank?

Great stress is laid by the learned Judge who delivered the opinion in the Circuit Court of Appeals upon the fact that the account of the Fidelity Bank for March 1887, transmitted by the Chemical Bank about the 1st of April, 1887, and received by J. Harry Watters, book-keeper of the Fidelity, contained an item to the credit of the Fidelity thus: March 2, 1887, "Tem. loan \$300,000."

If this were an item *against* the Fidelity there would be more force in the argument. A statement of the debit items imposes a duty upon the alleged debtor, whether a bank or an individual, to correct the item charged against him if there is anything wrong about it. A depositor knows more certainly than the bank whether the check purporting to be given by him is a forgery or not. When his account is shown him he owes a plain duty to the bank to notify it promptly of any erroneous charges. The duty of directors is to guard the interests of their bank. They owe no duty to guard the interests of persons giving *credit* to their bank. If they in fact know that another bank is lending them money of course their bank is responsible for the loan, but on what principle of law or equity are they required to know whether

another bank is loaning them money or not? Banks are not conducted on altruistic principles. It was the duty of the *Chemical Bank*, its officers or directors, to see that its funds were not loaned to an agent who had no authority to borrow. How can that duty be shifted to the officers or directors of the Fidelity so as to impose an obligation upon them to see that none of their officers *have* borrowed money without authority?

The cases cited by the Circuit Court of Appeals do not seem to us to sustain the contention that the Fidelity was bound to inspect carefully the account transmitted to it to see if it was credited with the proceeds of any loan.

*Leather Manufacturers' Bank vs. Morgan*, 117 U. S. 96, was the ordinary case of a depositor properly charged with a forged check on account of his failure to investigate the statement of his account sent him by the bank.

In *Kissam vs. Anderson*, 145 U. S. 435, relied on by the court, certain New York brokers illegally received funds of the Albion Bank by drafts drawn by its president to their order against the deposit of the Albion Bank in the Third National Bank of New York, the brokers knowing that the president was misappropriating the bank's funds in his private speculations. By the direction of the president they had made some deposits in the New York bank to the credit of the Albion bank, which they sought to have set off against the claim of the Albion bank. The question was, whether statements of account transmitted by the New York bank to the Albion bank showing these deposits to its credit by the brokers charged the Albion bank with knowledge that the deposit was made. It was held that the Albion bank was charged with notice.

Mr. Justice Brewer, in deciding this case, says:

"They (the brokers) deposited it to the credit of the

Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of the account ; but the president and teller had equal authority, and were equally chargeable with knowledge."

" At the least, it was a question to go to the jury whether the officers of the bank other than Warner, in the exercise of reasonable and proper care, could have ascertained that their moneys had been deposited to the account of the Albion Bank and would or would not have accepted such deposits as the return of the moneys to the bank."

The matter of the deposits of the bank belonged to the ordinary business of banking, and the officers of the bank, a part of whose duty it was to supervise deposit accounts, may well be held to notice, which will bind the bank of the state of such accounts. But to go further and hold that notice to officers or tellers in matters as to which they have no power, and in matters of not legitimate banking, and so as to affix a liability upon a bank by certain words in an account—a liability which only could be incurred by the directors themselves—and which account they never saw, and which it can scarcely be expected a director of a bank would see, is not, we submit, within the rule laid down in the above case. It is an attempt to foist, on the notice of a credit which belonged to the legitimate business of the bank, notice of a liability which it had no right to incur, and which directors had no reason to suppose was being incurred. Notice of a credit is no notice of a liability growing out of the credit. As in this case, as said by Mr. Justice Brewer, the rule might be different if Warner was the only officer—so here, it is different when the Board of Directors is the only authority to incur the liability.

But let us see exactly what the notice, which it is claimed, will render the bank liable, amounts to. Appellee's attorney has laid great stress on the part that early in April, the Fidelity Bank received from the Chemical, an account current of the transactions between the banks during the previous month. A copy of this account is printed separately as Watters' Exhibit, No. 10. In that account, under the date of March 2, appears on the credit side of the account the following:

1887 | Mch 2 |                      Tem. Loan 300,000

There are in addition several copies of letters and accounts called reconciliation sheets, sent backwards and forwards between the banks. All of these except the first, are mere matters for the bookkeepers in correcting errors, and in none of them does the item in controversy appear, and we can not see that any one of them could give notice of the alleged loan to any person who might have examined them.

Watters' Exhibit, No. 10, was received in the first instance by Watters, the general bookkeeper of the bank (Rec. p. 67, Q. 48). This account was received by him checked O. K., and filed away among the papers of the Fidelity National Bank. On March 2, Mr. Watters had received from Mr. Harper the charge and deposit tickets by which this item was charged to the Chemical and credited to Harper. This was the mode by which any sum deposited in New York for Harper's account would be transferred to him, and Watters naturally supposed that to be the explanation of this transaction. When, therefore, he received the account current and saw this item, he checked it as correct, and it excited in his mind no suspicion that it was different from what the entries in the Fidelity books indicated. He testifies that in view of these entries he would infer that this loan was made

to Harper. He has no recollection, however, of noticing it at all. But was it an entry which would in the ordinary course of business have come within the knowledge of the most vigilant director of a National Bank? If not, how can it bring notice of a loan to the bank home to the Board of Directors? Would such a board, exercising the greatest possible care over the affairs of the bank, reasonably be supposed to have seen this entry on that current account? Such a vigilance might have led them to inspect the Fidelity books, but such an inspection would have shown the transaction not to have been a loan, but a deposit for Harper's benefit, and the money drawn out by him. Bearing in mind the position that the loan must have originally been authorized by the Board of Directors, or that the board, with knowledge that such a loan had been made, ratified it—the evidence furnished from this account wholly fails to sustain any such ratification.

But it is claimed that Armstrong ratified this act of Harper. Ratification is based largely on the doctrine of estoppel. How can estoppel apply as against the receiver? How did any act of his affect the rights of the plaintiff bank so that it would be unjust at this time to claim the loan to be unauthorized? He had no power to ratify an unauthorized act of an officer of the Fidelity. His sole duty was to collect the assets of the Fidelity Bank, and under the directions of the Comptroller of the Currency, allow or reject claims, pay dividends, and settle up the affairs of a bankrupt bank. Did he deceive in any way the Chemical National Bank to its injury? Did that bank part with any rights, or surrender any property or claim on the faith that the receiver did not make any defense or objection to the acts of Harper? But he did reject the claim as soon as it was presented to him. When sued in this action, he did answer that the claim was

a debt of Harper, and not of the bank. What more could he do?

It is true that he brought suit against the Directors of the bank for damages sustained by the bank through the frauds of Harper, and claimed that the Directors had been negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named the present alleged loan as one of his fraudulent acts. That suit was not to recover from Harper the amount of that loan as having been paid to him. It was for damages growing out of his fraudulent acts, and could not in any way affirm and legalize what would otherwise be illegal. A large number of his fraudulent acts were set up in that suit, and it was claimed that by them the bank had been wrecked, and the stockholders damaged by the loss of the value of their stock. The suit was for damages done to the bank by the negligence of the Directors. This suit was compromised by the payment of \$450,000 by the Directors. We can see nothing in that whole case to show a ratification by the receiver, if such a thing were possible, of the illegal acts of Harper.

This damage was done to the bank whether this claim is a valid or invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the Directors for placing Harper in the position which he occupied.

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It is finally claimed that the Fidelity National received and enjoyed the proceeds of this loan, and in that way ratified the unauthorized act of Harper. It must be remembered that as a general rule, ratification is not binding, unless the party knew all the facts in the case at the time he is claimed to have ratified. If, however, he in fact received

and enjoyed the proceeds of the act, it would be unjust to permit him to disavow the act and retain the proceeds. But this receiving and enjoying the proceeds, must be a substantial and not a formal one, and it must be a reception and enjoyment of them as the proceeds of the unauthorized acts—knowing that they are the proceeds of such acts. If he receives and enjoys them without such knowledge, and disposes of them to other than his own use, or to a use which at the time he supposed he had a right to apply them, it is no ratification of the acts.

In the present case, the proceeds were credited by the Chemical to the Fidelity National Bank; on the same day that credit was transferred on the books of the Fidelity to Harper, and the amount paid to him on his checks; and when the credit in the Chemical was withdrawn, it was not withdrawn as the proceeds of a loan to the bank, but as money belonging to the bank, due to it by reason of the deposit to Harper and the checking out of that deposit. How Harper knew on that day that the credit had been given, does not appear. He may have presumed from the previous correspondence that it had been given, or he may have had telegraphic information of the fact. In fact the credit had been given on that day, and there is no doubt the entries on the Fidelity books referred to that credit, and it was the credit then made that was transferred to Harper, and checked out. The moment this sum was charged to the Chemical on the Fidelity books, it was credited to Harper. It was then drawn out by him for his own uses. The bank was no richer after than before the credit was given. It makes no difference that this was a fraudulent act on the part of Harper, or that the Chemical had no knowledge of Harper's fraud. It is immaterial why the Fidelity did not obtain the use of this money; the question is, whether it did actually as a matter

of fact obtain the use of it; or whether Harper obtained the use of it by transferring the sum to his individual account. In the case of the Western National Bank, the proceeds of the loan were deposited to the credit of the Fidelity. It was drawn out of the bank by the official drafts of the Fidelity upon blanks the same as used by it in all its business, signed by officers who confessedly had the right to sign such drafts, and paid by the Western in the faith and belief that they were the lawful drafts of the Fidelity Bank. The fraud of Harper was, in the present case, no greater; it no less bore the marks and adopted the modes of regular business transactions; it was no more carefully concealed from the Directors nor from the other end than in that case. The transfer of the funds to Harper was made in the regular mode of doing business. On March 2, 1887, Harper, the Vice-President of the Fidelity, presented to the book a piece of paper containing the words, "charge Chemical, \$300,000. Credit E. L. H. \$300,000, transfer of funds." The different clerks did make these entries. They charged that sum to the Chemical, and credited it to Harper, and those are the only entries on the Fidelity books of the transaction. This was no remarkable or unusual act of the vice-president of a bank. Mr. Goodman, on page 161, Mr. Rowe, on page 164, Mr. Yergason, on page 169, and Mr. Griffiths, on page 172, testify that the transfer of funds made in this manner is usual in the banking business, and that it would be the duty of the bookkeeper, on being presented with such a ticket, signed by the executive officer of the bank, to make the exact entries which were made in the present case. In the language of Mr. Rowe, "if a ticket in the form of the one used by Harper was presented by the vice-president to the bookkeeper, it would be the duty of the bookkeeper to make these entries"; and, as was remarked by another witness, if he should refuse



to do so, he would be discharged from the bank. There was nothing, therefore, unusual in this mode of transferring the funds. The effect of it was to give Harper the entire amount of the credit; to make the Fidelity the mere conduit through which the transfer was made, and when the Fidelity used the money, it was as its own, by virtue of the transfer to Harper. Harper, by that act, converted the sum to his own use. Had the loan been made to Harper individually, and the proceeds, by his direction, credited to the Fidelity by the Chemical, the same course would have been pursued, and the Fidelity would have received and enjoyed the proceeds of that loan as much as it did the proceeds of the present one. When these entries were made, the credit became the property of the Fidelity, and, in using the money, it was simply using money given to it by Harper for that purpose.

In the case of *Thatcher vs. Pray*, already cited, Thatcher left his horse with one Gray for safe keeping. Gray, without authority, sold the horse to Pray for one hundred dollars, and received his check for it. Gray assigned this check to Thatcher who cashed and used it; but applied the amount to the payment of another debt which Gray owed him. It was held by the Supreme Court of Massachusetts that the reception and use of the money was no ratification.

And again, *Bohart, Dillingham & Co. vs. Oberne, Hosick & Co.*, 36 Kansas, 284, the reception and use of the money was held to be no ratification, because it was paid in part to satisfy a liability against the agent in favor of the principal. And so in *First National Bank of Burlingame vs. Hanover National Bank*, 66 Fed. Rep., 34, a note was discounted for the president of the bank under an alleged agreement on his part that if not paid at maturity, it should be charged to the bank. The proceeds of the loan were credited to the bank, and transferred by it to the credit of the president precisely

as was done in the present case, and the bank then checked out the proceeds of the discount in its regular business, yet the Circuit Court of Appeals held that the bank neither retained nor enjoyed the proceeds of this discount, and that there was no ratification of the unauthorized act of the president. No more than this was done by the Fidelity. The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper, and then checked out of the Chemical in the regular course of business; and yet Justice Thayer says: "The bank neither retained nor enjoyed the proceeds of the discount." And in just the same manner, so far as the Western National Bank was concerned, were the proceeds of the loan in that case retained and enjoyed by the Fidelity. They were placed to its credit, and the proceeds checked out by regular drafts of the bank, signed by the proper officers, and paid by the Western National in good faith.

It is no ratification because it was used not as the proceeds of a loan made to the bank, for the Directors did not know that such a loan was made, nor did its books show such a loan, but the contrary—but was used as its own, deposited in the bank by Harper and credited, and paid to him.

It is true that the Chemical had no knowledge of the entries made on the Fidelity books, nor of the frauds of Harper. Neither did the Western National Bank know the frauds that had been committed by Harper. In both cases, however, the loan was an unauthorized one—an illegal one. It was made on the application of one who had no right "to exercise such a power," "and by one presumed to know the powers of that officer." The placing of the money to the credit of the Fidelity was the culmination of this unauthorized and illegal act, and it enabled Harper to consummate the fraud by transferring the proceeds of the alleged loan to

himself. Had not this illegal loan been made, Harper could not have fraudulently obtained this money. Had the Chemical required a resolution of the Board of Directors of the Fidelity to authorize this loan before making it, Harper would never have appropriated the money. As the illegal act of the Chemical made the fraud possible, it requires something more than the use of the money in the way in which it was used to make the bank liable. It requires knowledge of the fraud in the Directors of the bank; it requires that when they used it, they knew that it was proceeds of a loan made by the Chemical to the bank, and not as a sum credited and paid to Harper, and used as a compensation for that credit.

The authorities here cited, it seems to us, clearly establish the position that in the present case there was no such enjoyment of the proceeds of this loan as will ratify the unauthorized act of Harper.

It is claimed in argument that Harper defrauded the Fidelity, not the Chemical, and that the borrowing from the Chemical had nothing more to do with his taking \$300,000 from the Fidelity, by having that amount entered to his credit, than if he had taken cash out of the vaults. We do not see how it would benefit the appellee if Harper had taken the \$300,000 out of the vaults even with the express consent of the Directors if the act had been permitted on account of the credit given to the Fidelity by the Chemical.

When Harper told the bookkeeper to credit him with \$300,000 and charge the same amount to the Chemical (Rec., p. 64) he was asking the true legal effect to be given to his fraudulent act. Having borrowed the money for the Fidelity without authority it was a loan to himself. If he had been in New York to receive the money and had decamped with it, the Chemical after discovering the fraud would no doubt

have changed the credit from the Fidelity's account to the individual account of Harper. At least, that is what it ought to have done. But Harper was not there. He therefore asked to have the money, which had in legal effect been loaned to him, to be credited to the Fidelity which was done. This fraudulent act against the Chemical completed enabled him to draw the money from the Fidelity. The effect was the same as if he had stolen the money from any third bank and deposited it in the Chemical with one hand, taking it out of the Fidelity with the other.

## II.

The next error complained of relates to the manner of crediting the proceeds of collaterals.

Of the paper sent by Harper as collateral security for the loan, a small portion only was the property of the Fidelity Bank (Rec., p. 66, Q. 35). The residue was the property of Harper.

The bill of complaint admits that the sum of \$75,000 had been realized from the notes of J. W. Wilshire, part of the collaterals which the testimony above referred to shows belonged to Harper. This amount had been paid prior to the proof of claim, as appears by the copy of proof (Rec., p. 90).

After suit was brought, but before defendant's amended answer was filed, the further sum of \$20,469.29 was realized from the paper of The Champion Machine Co. and bonds, which part of the collaterals belonged to the Fidelity Bank, as shown by the above testimony. (Rec., p. 66, Q. 35, and p. 76.)

Three questions are therefore presented by the record:

First, shall the creditor be required to exhaust his collat-

eral security and credit the proceeds on his claim, or to surrender his collateral, before proving his claim?

Secondly, shall he be required at least to deduct from his claim the proceeds of collateral received before proving his claim?

Thirdly, shall the proceeds of collateral received after proof of claim, but before dividends are paid, be deducted from the amount of his claim as proved and dividends be paid on the balance only?

Before discussing generally the principles that govern the application of collaterals to claims against insolvent estates, we desire to call the Court's attention to one feature of this case that renders it specially inequitable that dividends should be paid on the entire claim.

Harper, having borrowed this money for his individual purposes, is, as between himself and the Fidelity Bank, the *principal* debtor. The \$75,000 received before proof of claim was his money—the proceeds of notes that belonged to him. Now, if the bank is to be held liable on the ground of some custom established by the New York banks, or negligence in its own Directors, or some principle of estoppel, we submit that it ought to have credit for that portion of the loan repaid by the proceeds of Harper's collaterals.

The section of the statute of the United States in reference to National Banks which regulates the payment of dividends is 5236 R. S., and reads as follows:

“From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such associ-

ation are paid over to him shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The provisions are that the dividends shall be "ratable" of the money paid over to the comptroller by the receiver, and shall be "on all such claims as may have been proven to his satisfaction or adjudicated in a court of competent jurisdiction." The dividends must be ratable, *i. e.*, proportionate, according as the amount of each claim is to the amount to be divided. Again, it is to be on all such *claims* as have been proven or adjudicated. It must be a claim, *i. e.*, a debt. It must be proved to the satisfaction of the comptroller; or if he rejects it, it must be adjudicated in a court of competent jurisdiction. A claim as used in the statute is synonymous with indebtedness or liability.

In the language of Chief Justice Waite, in *Waite v. Knox*, 111 U. S. 784.

"All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment."

The claim must be proved to the satisfaction of the comptroller. It must be supported by affidavit that the amount is actually due, that is claimed. If rejected by the comptroller, it must be adjudicated in a court of competent jurisdiction. This can be done by a suit against the insolvent bank, if still in being.

"A receiver's decision upon the validity of a claim presented to him for a dividend is not final. A creditor may proceed against the bank in the proper State Court to have the validity of his claim judicially determined."

*N. Bank of Bethel v. Pahquioke Bank*, 14 Wall. 383.

The suit may be brought against the receiver, as in the present case, to compel the allowance of a claim ; but whether it is brought against the bank itself or the receiver, the question before the Court is the same, to determine judicially the validity of the claim. The amount of the claim is as much a part of its validity as any other question in the case. How much, if anything, does the insolvent bank owe to the plaintiff in the case, is the question to be determined.

The amount of the claim is not affected by the solvency or insolvency of the bank. Suppose the Fidelity Bank had not failed, and a controversy had arisen between it and the Chemical in reference to this loan, and the Chemical Bank had brought suit against the Fidelity to recover the amount of that loan, after the former had made collections on the collaterals held by it for its security, could there be any question that it could only have recovered a judgment for the amount of the loan after crediting the payments made to it up to that time from the collections of collateral? And why? Simply because that was the amount then due. That was the claim then legally existing. The claim is no larger because the Fidelity Bank has become insolvent. The claim is still the amount actually due ; that is what must be proved or allowed, or judicially adjudicated by a court of competent jurisdiction.

In *re Pulsifer*, 14 Fed. Rep. 247,  
Justice Blodgett says, as to the amount of the claim to be allowed,

“The same rule must apply in the case as would hold if a suit at law had been brought by the bank against the bankrupt as endorser of this paper.”

This decision was not based on the provisions of the Bankrupt Act.

But it is claimed that there is a fixed date when the amount due is determined, and that the amount then due remains the amount on which dividends are to be paid, whatever changes may occur, and that this date is that of the suspension of the bank.

The case of *White v. Knox*, 111 U. S. 784, is referred to as sustaining this position. The question before the Court in that case was as to the date to which interest on claims should be calculated. The Court held that interest should be calculated on all claims to one date, and as no new debt could be contracted after the suspension of the bank, that was a convenient date to fix for that purpose. As interest on all other claims had been calculated to that date, the plaintiff in the action pending before the Court must be governed by the same rule. The object was, as stated by Chief Justice Waite, "that all creditors might be treated alike." This was accomplished by fixing a time to which interest on all claims should be calculated. It was immaterial what time that should be, so that it was the same to all. The Court had adopted the day on which the bank suspended payment, and for the reason given above, that action was approved. To use that date for the purpose claimed in this case, would reverse the result aimed at in the decision. It would not treat all creditors alike, but permit those to whom payments were made after that time to have an advantage over those to whom payments were made before that time.

The cases of *National Bank vs. Colby*, 29 Wall. 609, and of *Scott vs. Armstrong*, 146 U. S. 409, are also cited on this point.

Those cases do name a date when certain rights become fixed. But unfortunately for the argument it is not the date claimed in this case. In the first case it is declared that all transfers by an insolvent bank, and all payments of money



made after an act of insolvency, or in contemplation thereof, with a view to a preference of one creditor over another, shall be utterly null and void. The object is stated to be to secure equality among the creditors.

In *Scott vs. Armstrong*, the court says that the right of the party becomes fixed as to certain matters, as of the date of the act of insolvency. This date may be some time before the closing of the bank by the comptroller.

The case of *Eastern Township Bank vs. Vermont National Bank*, 22 Fed. Rep. 186, was also upon the question as to the date of calculating interest. And in this case a still different date is named, that of the appointment of the receiver; showing that there is no fixed time determining the rights of the parties as to interest, only such convenient time as applies to all alike and will equalize their claims.

In those cases where the date is fixed by the statutes regulating national banks, it applies only to transfers of property or payments of money, with intent to create a preference. It has no reference to fixing a date when the amounts of claims against the bank shall be irrevocably fixed. The object is stated to be to secure equality among the creditors, and not to enable one to secure an advantage over another.

Let us illustrate the result of the claim made in this case. Suppose a creditor's claims against an insolvent bank should be founded on an endorsement of bills receivable discounted for it. At the date of the closing of the bank this paper is not due, or if due has not been paid. The claim at that time would be the full amount of the paper. Suppose afterwards the makers of the paper should pay part of it. Would the creditor still be permitted to prove and collect dividends upon the entire claim? Or, if this is not granted, suppose the claim is made up of endorsements upon a number of bills receivable, none of which were paid at the date of the

suspension of the bank, and after that date one of such bills should be paid by the maker in full. Would the creditor be permitted to still prove and collect dividends against the endorser upon the whole amount of the bills receivable unpaid at the date of the suspension? On the principle claimed by the plaintiff in this case, he could. But the fixing of a date in the cases cited, and in the statute, seems to be for the purpose of equalizing the rights of all the creditors in the assets. The claim made in this case defeats that intent.

When a creditor is required to prove his claim; to verify it to the satisfaction of the comptroller, or to adjudicate it in court, the natural conclusion is that the claim must be one then existing and for the amount existing at the date of the proving or adjudication. No other time for that purpose is named in the statute.

The argument of counsel that

“As the demand of the statute that claims should be equalized for dividend purposes as they stood at the declaration of insolvency requires the creditor to ignore temporarily all additions to the claim since that day by way of interest, so on the other hand, equal justice requires that he should be permitted to ignore temporarily all deductions from the claim since that day by way of credits,” is wholly fallacious. The equalizing at a certain date in the matter of interest, is wholly a matter of convenience and takes nothing from the creditor. Were interest calculated on all claims, to the date of dividend and the assets then divided pro rata, each creditor would receive the same amount as if the interest were calculated to the date of suspension. But if the creditor is permitted to receive payments after any date without deducting them, he obtains an advantage over all other creditors.

We contend, therefore, that according to the proper construction of the national banking act a dividend is payable

only upon the amount actually due: upon the amount for which a judgment would be rendered if suit be brought against the bankrupt: that the insolvency of the bank, if it takes no rights from the creditor, adds none to his claim; and that the doctrine that a particular time is established at which all claims must be valued, applies only to matters in which all are interested alike, and not to matters such as payments on particular claims, and is established in the interest of equality among the creditors, and not to destroy equality.

The next question to be considered is whether aside from the provisions of the national banking act, the complainant is entitled to prove its original claim without reference to the payments made on that claim from collaterals collected.

It is admitted that upon this question the decisions of the courts have not been uniform. Some have held that the creditor must exhaust his collaterals, and prove only for the amount of the indebtedness after crediting the value of the collaterals. Others, that he may prove for the entire amount of his claim without reference to the collaterals held by him. The uniform course of legislation, both in England and in this country, providing for the settlement of bankrupt estates, has adopted the first of these modes of settlement. It is true that during the life or the solvency of the debtor, a creditor holding collateral may sue his debtor upon the principal debt without reference to any collateral that he may hold. Giving collateral is unquestionably not payment of the debt. This right seems to be the basis of all the decisions sustaining the claim made by the complainant in this case. It is said that death or insolvency ought not to divest a creditor of any right which he might have exercised prior thereto. No such claim is necessary to sustain the decree of the court below. It is only necessary to claim that the

same rule shall apply to an insolvent as to a solvent debtor. In the case of the latter he may be sued for the entire debt; but the creditor must use due diligence to collect the collateral, and is liable to his debtor if he fail to do so. The payment of collateral in such a case invariably reduces the amount of the debt. And after any such payment has been made no greater amount can be found due than the amount of the debt so reduced by the payments on the collateral. Must not the same rule apply to an insolvent debtor?

Again, Chief Justice Waite holds that all creditors must be treated alike. Suppose, by way of illustration, two creditors hold against an insolvent debtor a claim of one thousand dollars each. One holds collateral of the value of five hundred dollars; the other none. The first is, therefore, a secured creditor in the sum of five hundred dollars and an unsecured one in the sum of five hundred dollars. The second one is an unsecured creditor for one thousand dollars. The assets of the insolvent debtor pay a dividend of fifty percent. The result will be on the claim made by the complainant in this case, that the first creditor will have his unsecured debt paid in full, while the second creditor will receive a dividend only.

Again, two creditors hold collateral of a like character. One receives payment from the collateral held by him the day before the bank closes. He must credit that collateral and sue for the balance. The other receives payment the day after such suspension, and yet according to the claim of appellant, he may prove for the full amount of the original claim. This is not making the creditors equal.

The whole history of legislation in reference to insolvent estates shows a universal sentiment as to the justice of the claim made by the defendant. We believe that every Bankrupt Act of Great Britain, of the United States, and of the

separate States, recognizes and adopts this principle of distribution in bankrupt estates. The fact that the rule was not only adopted, but has been continued from time to time until now, is the strongest evidence of its justice and equality among creditors that can be imagined.

Section 5075 R. S. U. S. provides as follows :

“Section 5075. When a creditor has a mortgage or bill or pledge of personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct. Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.”

And similar provisions were enacted in previous statutes, and also in the Bankrupt Act of 1898. After such a recognition of the Rule it is scarcely necessary to argue as to its justice and equality to a court of the United States. It is true that the national banking act does not contain a similar provision. Indeed, it contains no details or direction as to the manner in which distribution shall be made except as quoted before. But at the date of the passage of that act, the bankrupt act was in full operation ; and it would be strange indeed if Congress did not intend that the same rule should apply to all insolvent estates within its jurisdiction, whether of individual bankrupts or of insolvent national banks.

Nor is the argument of complainant's counsel as to the inconvenience of the rule sound. The rule has been in force in all the bankruptcy cases in England and this country without inconvenience or injustice to any creditor. Even if a new calculation of interest were required on the payment of each

dividend, it would be better than to do such injustice to creditors as is claimed in this case. But no such calculation of interest is necessary. All that is necessary is to re-state the claims of such creditors as have received partial payments. This is always done in the case of solvent debtors, and may with equal ease be applied to insolvent ones.

What was the duty and liability of the Chemical National Bank in reference to the collaterals sent to it by Harper? The collaterals consisted entirely of promissory notes of different parties.

Schouler of Bailments, p. 213, says:

“On this latter point” (speaking of the pledge of bills receivable as collaterals) “the rule deducible from the number of late decisions is that the pledgee of negotiable securities not only has the right, but is bound in the exercise of ordinary diligence to make presentment for collection on their maturity, and then apply the proceeds on the pledged account.”

And on page 192, speaking of the duty of the holder of bills left as collateral, he says he must “Collect it, and apply the proceeds to the principal debt.”

And in *Wheeler vs. Newbould* 16 N. Y., 398, the court, speaking of the duty of the creditor, in this case the Chemical National Bank, in reference to the collaterals held by it, says:

“It will rather presume that it was the intention of the parties to the contract that the creditor should, if he resorted to the pledge in place of the personal liability of the debtor, accept the money upon the hypothecated security as it became due and payable, and *apply it to the satisfaction of the debt.*”

There are many other authorities to the same effect. It was, therefore, the duty of the Chemical National Bank to

collect the collateral paper as it matured, and to apply whatever it received to the satisfaction *pro tanto* of the debt as security for which it was given. This duty was not changed by the insolvency of the Fidelity National Bank. Its obligation to collect and apply continued the same. The effect of payments received from collaterals remained the same. Such payments should be applied to the satisfaction of the debt afterwards, as before.

Let us now look at the decisions of the courts on this question.

Three English cases have been cited by the counsel for the complainant, and as we think they fairly state the result of English authorities, we will confine our argument to them.

They are:

*Greenwood vs. Taylor*, 1 Russ. & Myl., 185.

*Mason vs. Boggs*, 2 Myl. & Cr., 443.

Kellock's case.

In re Xeres Wine Shipping Co., } Law Reports, Chy.  
  } Appeals, vol. 3, 779.

The first case sustained the entire claim as made by the appellant in this case. The second doubted the correctness of that decision, but finally failed to overrule it. The third sustains the position taken by Judge Sage, that collaterals realized before proof of claim only, should be deducted.

In *Greenwood vs. Taylor*, the Master of the Rolls says:

“The rule in bankruptcy must be applied here; and the mortgagee can not be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. This rule is not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the

administration of assets. The mortgagee who has two funds as against the other specialty creditors who have but one fund, must resort first to the mortgaged security, and can claim against the common fund only what the mortgaged estate is deficient to pay."

If this case is followed, the defendant is entitled to have all payments credited on the debt whether made before or after proof of claim, and on subsequent dividends to have the debt revalued by crediting payments made since the former dividend.

In *Mason v. Boggs*, the Lord Chancellor remarks:

"I can not distinguish this case from *Greenwood v. Taylor*. But with respect to the principle of that case, it is to be observed that the mortgagee has a double security. He has the right to proceed against both and to make the most he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see.  
\* \* \* What you contend is that the creditor can not proceed to enforce his legal rights unless he gives up his security."

And on page 447:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

This last expression would indicate that a payment would reduce the amount of the debt, and that therefore if made before proving the claim it should be deducted.

In both of these cases the creditors held mortgages securing their debts. These mortgages had not in either case been foreclosed or paid; and the sole question was as to the right of the creditors to proceed to enforce both the mortgage and the indebtedness.



The third case arose under the winding up provisions of the Company's acts of 1862. In Kellock's case, Kellock & Co. held accommodation acceptances of Bernard's Banking Company for £31,264, secured by a lien on certain vessels against which the bills were drawn. A winding up order was issued May 8, 1866, and in June, 1866, Kellock & Co. sent in their claim to the official liquidators. In 1867 they realized on part of their securities £9,916. The claim was afterwards disputed, and the hearing upon the exceptions took place after the above sum had been realized.

In the Xeres Wine Shipping Co. case, the Alliance Bank had a claim secured by a lien on wine partly in its possession, and partly in the possession of the Xeres Wine Shipping Co. The winding up order was issued in December, 1864, and on March 2, 1865, the creditor sent in its claim to the official liquidators, crediting £85 realized between the date of the winding up order, and the sending in of the claim. The case was first heard by the Vice-Chancellor, Sir A. R. Mallins, and was decided in the following language:

“The winding up is a *quasi* bankruptcy. The official liquidator takes possession of all the assets of the company. He realizes them under the 133rd section, and distributes them ratably, or *pari passu* among the creditors, but over and above the assets calls may be made on the shareholders. On these grounds I am of opinion that the rules in bankruptcy are applicable; and therefore, that every creditor having a security must realize the security and come in as a general creditor for the balance due to him after such realization. The winding up order was made in 1864, and in 1865 the bank realizes their securities, and now, in 1868, they ask me to admit them to stand as creditors for the whole amount of their original debt. Now, if the official liquidator had given them a check for the amount they realized on their security the Company would not then have thought of con-

tending that they should stand as creditors for the whole amount of their original claim, and they have no higher claim to stand for the whole amount because they realized their security instead of being paid by the official liquidator.

I must, therefore, come to the conclusion that the bank must be admitted as creditors for the balance which remains due to them after realizing the securities held by them, and for that amount only."

On appeal this decision was reversed, but in deciding the case the Court says:

"There remains the question as to the time with reference to which the amount proven is to be ascertained. And as to this there is a little more difficulty. I think, however, that the true rule is that the debt is to be taken as it stands at the time when the claim is put in. The 20th Rule of the General Order under the Act of 1863 directs an advertisement fixing a time for the creditors to send the particulars of their debts or claims to the official liquidator, and appointing a day for the adjudication thereon. The Court, therefore, is to adjudicate upon the debt or claim so sent in, and the adjudication at whatever time it may take place must be on that debt or claim, and I apprehend the only way of adjudicating on it must be to adjudicate on what was due when the debt or claim was sent in."

And Chief Justice Seldon, on page 783, says:

"If we look at the practice established by the General Order, it is entirely within the discretion of the judge to fix the time within which the creditors are to send in the particulars of their debts or claims. Of course, until that time, the debt can not be established. \* \* \* I think, therefore, that the balance of convenience and inconvenience incline strongly to the view which my learned brother has expressed, which is, that the debt is to be taken as it stood when the creditor put in his claim."

From this decision it is clear that the sending in of the claim was the equivalent to proving the claim under the national banking act. The winding up order was the date when the assets were taken possession of by the official liquidator. It had the same effect as the closing of the bank by the comptroller. Notice was then given to send in claims against the company. And the court in making that order had the right to fix any future time which it might think proper within which claims were to be presented. No affidavit to the claim was necessary. The creditor presented and filed the claim with the liquidator the same as creditors file their claims with the receiver, and it is the date when the claim is presented and filed under this order when, according to the court in this case, the amount due is fixed. All payments made prior to that time must be credited. And so in the case now on hearing, all payments made prior to the proving of the claim and filing it with the receiver must, according to this decision, be credited on the debt, and reduce the amount due.

The result, then, of the English cases, is a decision in the *Greenwood vs. Taylor* case, and by the lower court in Kellock's case, in favor of the claim made by the defendant on the appeal; of the upper court in Kellock's case in favor of the decision of Judge Sage throughout; and in *Mason vs. Boggs*, an expression of opinion without any decision.

We submit that the weight of authority in England is strongly against the claim of the complainant.

When we examine the decisions of the different courts of the United States, I think that we will find the result to be similar to that shown in the English courts.

In the case of *Amory v. Francis*, Administrator, 16 Mass. 309, the Court holds as follows:

“ If the creditor of an insolvent estate has a mortgage as

security for his debt of less value than the amount of his debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged."

Judge Parker, on page 311, says:

"Were it otherwise, the equality intended to be produced by the Bankrupt Law would be grossly violated, and 'The rules were adopted in England on account of their reasonableness and because consistent with the nature of the contract.' and 'There seems to be no reason why the same rule should not be applied to the settlement of deceased insolvent debtors in this commonwealth, for the Statute which provides for a distribution of these among creditors requires an equal pro rata distribution, and it never could have been intended by the Legislature that a creditor having security should have an advantage beyond the actual value of the property mortgaged. If the creditor had taken possession of the mortgaged premises, and foreclosed the mortgage, he would have the right to consider the estate a payment *pro tanto* according to its value, and file his claim before the Commissioner for the balance, as it has been settled in several cases.'"

And in *Farnum, et al., vs. Boutelle*, 54 Mass. (13 Mett.) 159, Chief Justice Shaw, on page 164, held:

"For if the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as authority, that the creditors can not prove their debts without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance."

And in *Solier vs. Loring, et al.*, 60 Mass. (6 Cush.) 537, it is held:

"The holder of a bill of exchange, no part of which has been paid, may prove it in full in insolvency against the estate of each party thereto, and receive a dividend from each upon his whole claim, provided he does not receive in all

more than the whole amount of the bill. But any proof sought to be made after he has been paid any part of his claim, can be only for the unpaid balance."

On page 548 the Court says:

"But there is a distinction in this case where a holder applies to prove his debt against one party after having received a part of it from another; and when he applies to prove before receiving any payment or composition from another party, or before a dividend has been declared in his favor under a commission against another party. Any sum actually received in payment from any party to a bill before proof made against another must be deducted from the amount to be proved against any other party."

And in a still later case in the same state, the *Merchants National Bank vs. Eastern Railroad Company*, 124 Mass., 524, decided in 1878, the court says:

"The certificate as a payment must, therefore, represent the actual debt reduced by the value of the collateral security. This result conforms to the rule of equality which the statute plainly recognizes as existing between all the creditors. It is supported by the consideration that it is the rule in bankruptcy, the rule applied in this commonwealth to the settlement of the insolvent estates of deceased persons; and the rule in equity which requires a creditor who has two funds for the payment of his debt as against the other creditors who have but one, to resort first to his own security, and permits him to claim against the common fund only to the extent that the security which he holds falls short."

It is claimed that the Massachusetts decisions here cited (and there are several others in the same State to the same effect) are based on the Bankrupt Law of that State, and that, therefore, they ought not to apply to a case in equity. Those decisions, however, are not in cases of bankruptcy at all. But they are based upon what the Court regards as equity as ap-

plied to the settlement of estates of deceased persons, and other insolvent estates not in bankruptcy. The Courts do hold that the provisions of the Bankrupt Law are in accordance with the intention of the act to distribute the assets of deceased insolvents ratably among all the creditors; and the same rule should apply to the Courts of the United States, for the Statutes of the United States have adopted the same provisions in the National Bankrupt Act as Massachusetts did in its State Bankrupt Act. The eminent Judges who delivered the opinions referred to believed that such decisions were in accordance with the rule for distribution of assets, to which we have referred, and their opinions upon that subject are entitled to weight in all courts.

In the case *Wurtz vs. Hart*, 13 Iowa, 515, the Supreme Court of Iowa held:

“A creditor under a general assignment who has special security may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he takes a special lien.”

The counsel for the appellant refers to this case as being decided without much consideration; but it never has been departed from in a decision of that State, and in the recent case of *Doolittle vs. Smith*, decided by the Supreme Court of Iowa on January 21, 1898, was expressly affirmed (73 N. W. Rep., 867). In the latter case a creditor, after proving her claim against an assignee for the benefit of creditors, realized a large sum from her collaterals. The Court required her to credit the amount and received dividends on the balance only.

In *Midgely vs. Slocum*, 32 Howard's Practice Rep., 423, it was held:

“Where a bank, a creditor holding notes belonging to

the class mentioned in the assignment to a large amount, which were secured in part by a pledge of notes by other parties, which other notes had been collected by the bank, held that the law applied these collections to the payment of the principal debt, so that the bank had ceased to be a holder of the notes thus paid, and was not entitled to a dividend on the basis of the original indebtedness."

And in Knowles, Petitioner, 13 R. I., 90, the Supreme Court of Rhode Island held :

"In Rhode Island a creditor who has a claim secured by a lien, is entitled to a dividend from the voluntary assignment of his debtor only on such residue of his claims as may remain unpaid after he has exhausted the property subject to the lien."

In this case the Court refers to the various decisions of the courts upon this question, and concludes by saying that it preferred the doctrine of the cases in which it has been decided as thus held by that court, and says, further :

"It also accords with the policy of our present Statute that creditors shall share equally in proportion to their respective demands in the assets of their debtor. We are of the opinion, therefore, that the proceeds of the mortgaged property are to be first applied to the payment of the notes, and the dividend paid upon the residue only."

It is true, as stated in the Brief of Appellee, that the same court in 15th R. I. has decided this question in a different way, and that, therefore, the Supreme Court of that State may be counted on both sides of the question. We give this decision simply as the argument of the Judges who composed the court at that time in favor of the doctrine which we claim is equitable.

In re Souther, 2 Low., 320, Justice Lowell says :

"The general rule undoubtedly is that the holder of a

note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule that what he has received from one party, or from dividends from one party in bankruptcy from the note, are payments which he must give credit for if he afterwards prove against others."

And, again, on page 321 :

"The theory of this decision is that no creditor can prove for more than his actual debt as it exists at the time of the proof, without obtaining an undue advantage over other creditors."

In re Pulsifer, 14 Fed. Rep. 247, it is held:

"A creditor has no right to prove his debt and receive dividends on any more than the actual amount of the bankrupt's liability. So a bankrupt endorser is liable only for the balance due on notes endorsed by him after deducting the amount paid by the maker of the note."

And on page 249 the Court says:

"The same rule must apply in a case as would hold if a suit at law had been brought by the bank against the bankrupt as endorsers of his paper."

So in the present case, the Chemical National Bank has the right to prove for the exact sum, and no more, that it could have recovered judgment for in a suit at law brought by it against the Fidelity National Bank at the time when the offer to prove was made.

See, also, ex parte Harris, et al., 14 Nat. Bk. Register, 422.

A very strong case is that of *The Third National Bank of Baltimore vs. Lanahan, Trustee, et al.*, decided January 5, 1887, and reported in 66 Md. 461 (7 Atlantic Rep. 615).



The syllabus is:

“Under an assignment for the benefit of creditors, the obligation of the Trustee to pay a debt owing by the assignor does not depend on the state of the account between the creditor and the assignor at the time of the assignment, but at the time when payment is made.”

“Where at the time of the assignment a debt of the assignor is secured by collaterals and is subsequently partly paid to the creditor by moneys realized from the collaterals, before a dividend on the debtor's estate is made, such creditor is not entitled to a dividend on the full amount of the indebtedness, but only on that portion which remains after deducting the amount received from the collaterals.”

The facts were, R. W. Raisin and W. L. Raisin, general partners as W. L. Raisin & Company, made a general assignment for the benefit of their creditors, both individual and partnership. The assignment embraced all the property of the firm, and all the separate property of each partner. The Third National Bank was a creditor of the firm. A portion of this indebtedness arose in this way: S. K. Cooper, known as a special partner of the firm, executed five promissory notes of \$5,000.00 each, payable to the order of R. W. Raisin & Company. These notes were secured by the pledge of certain other notes belonging to the partnership and which were owned by its debtors. They were delivered to the bank together with the collateral security, and by it discounted after they had been endorsed in the firm name. \* \* \* Before the filing of the claim it had collected a large sum from the collaterals pledged to secure the discounted notes.

Judge Bryan held:

“Where an assignment is made under a trust deed directing the trustees to pay all the creditors in full, if the assets are sufficient, and if not, then ratably and equally according

to their respective amounts, a creditor, being a bank with whom notes due the debtor were deposited as collateral to obtain advances on his notes, and which has largely realized on the collateral, can not claim a dividend on its whole debt without deducting the amount realized on the collaterals."

And, again:

"Before the filing of the claim, it (the bank) had collected a large sum from the collaterals pledged to secure the notes. It contends that it is entitled to a dividend on the full amount of the indebtedness, without deducting the sum received from the collaterals. \* \* \* The trustee is required to pay all the partnership creditors in full, if the partnership assets are sufficient; and if not, then ratably and equally according to their respective accounts. It can not be denied that the sum received from the collaterals diminished the indebtedness of the partnership. We do not see how any question in respect to the marshaling of the assets can arise. It is simply a question where a portion of a debt is paid by property of the debtor pledged to secure its payment. It is not a question whether other creditors can compel the bank to seek payment from the collaterals before claiming distribution from the trust fund. The bank has actually received payment to a certain extent. The portion remaining unpaid is an ordinary debt reduced to judgment."

The counsel for appellee speak of this case as decided upon the peculiar terms of the trust deed made in that case. But those "peculiar terms," as they call them, were simply the same as the statutes regulating the distribution of the assets of insolvent National Banks apply to such assets. It was that they should be divided ratably and equally. No other condition applied to the mode of distribution, and so the assets of insolvent National Banks are to be distributed equally and ratably among the creditors. And the court, in deciding the case refers to the various decisions cited in the

present case, and gives its judgment as its conclusion from those decisions.

The same court in the recent case of Nat'l Union Bank of Maryland vs. Mechanics' Bank of Baltimore, 80 Md. 371, not only approve as "just and equitable" the rule that distribution should be made on the basis of the amount then due, but require the secured creditor to exhaust or deduct the value of his security before proving his claim. It was a case of an assignment for the benefit of creditors, and much stress is laid on the inconvenience of permitting the secured creditor to participate for the full amount of his claim in the assets and afterwards to collect the full amount of his collateral, with all the risk of his own insolvency when called upon by the assignee, from whom he has received dividends, to refund the excess above full payment.

Another strong authority is the case of *Wheat vs. Dingle*, 32 S. C. 473, decided April 10, 1890. The syllabus is as follows:

"Where lien creditors of an intestate receive part payments after his death from the proceeds of property mortgaged and pledged, they are entitled to dividends along with the unsecured creditors out of the general assets, but only upon the amount of their demands remaining unpaid after such application, and not upon the amount due at the date of the intestate's death."

After referring to the case of *Morton vs. Caldwell*, and stating the questions decided in that case, the Court says:

"This seems to us, considering the facts, strictly correct; but suppose the payments referred to instead of having been made by a third party had been out of the estate proper of the debtor himself, would it be for a moment contended that such payment did not release that much of the amount for which the deceased was originally liable to the creditor? It

seems to us that such result would not only be in violation of all principles but entirely unjust. \* \* \* After the property mortgaged has been sold and applied to the debt, leaving a balance of the debt unpaid as to that balance, the creditor is no longer a mortgage creditor, but stands only where his evidence of indebtedness is, and he gets judgment for the balance alone on his claim whatever it may be from which has already been eliminated what was a mortgage debt."

This case most clearly disposes of the claim that the amount due at the intestate's death, or at the date of the assignment is the only amount upon which dividends must be paid, and that payments made after such dates can not be considered in distribution. This claim is the one which the counsel mainly argued as settled by the case of *Morton vs. Caldwell*.

A recent case in the same state, *Ragsdale vs. The Winnsboro Bank*, 45 S. C. 575, makes a distinction between payments from a principal's estate, after proof filed against both insolvent principal's and surety's estates, and payments from securities that came from the debtor's estate. The court approves the ruling in *Wheat vs. Dingle*, but shows the very just and equitable distinction between a rule that permits full dividends on the whole amount due when there are *two distinct debtors* (even though principal and surety) and a rule that permits such dividends when the creditor has received part payment out of the debtor's assets held by the creditor as security. The court say, p. 583 (italics ours): "We understand that the exceptions to so much of his Honor's decree as decided that creditors who hold collateral securities should be paid their *pro rata* dividend, regardless of the amounts they may have collected, or may yet collect, on said collaterals, has been abandoned. *This court, however, does not desire it to be understood that it assents to this rule of distribution.*"

The Supreme Court of Washington, on December 9, 1892, decided the case *in re Frash*, which is reported in 5 Wash. 344, and from which we make the following quotation:

“Section 8 of the Act provides that the assignee shall, from time to time, make full and equal dividends among the creditors of the assets in his hands in proportion to their claims, not a dividend in proportion to their claims, simply, but a full and equal dividend. It is for this purpose that the assets are marshaled and placed under the control of the Court, that if a creditor comes in to prove his claim he must come in upon equal footing with creditors of a like class. As we have before said, if a creditor were allowed payments on his whole original claim, he would have greater advantages than the original security contemplated, for as was well said in *Amory vs. Francis*, 16 Mass. 308, ‘originally it would only have been security for a proportion of the debt equal to its value, whereas by proving the whole debt, and holding the pledge for the balance, it becomes a security for as much more than its value as is the dividend which may be received upon the whole debt.’ We think that the plain and universally recognized principles of equity demand that the secured creditor must first exhaust his security, apply the proceeds to the diminution of his claim, and then share *pro rata* with other unsecured creditors on the balance of his claim. Such is the holding of the Iowa cases under a statute identical with ours. See *Wurtz vs. Hart*, 13 Iowa, 515. Such also is the holding of the courts of South Carolina, Louisiana, Vermont, Maryland, and Massachusetts. Some of the Massachusetts cases, but not all, are decided on the strength of their Statutes in Bankruptcy.”

In many of the cases cited reference has been made to the Rule in Equity regulating the marshaling of securities. We quote this Rule as laid down in Story's Equity Jurisprudence, section 633:

“The general principle is that if one party has a lien on,

or interest in, two funds for a debt, and another party has a lien on, or interest in, one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the right or operate to the prejudice of the party entitled to the double fund. Thus a mortgagee who has two funds as against the other specialty creditor who has but one fund, will in the case of the death of the mortgagor, and the administration of his assets be compelled to resort first to the mortgage security, and will be allowed to claim against the common fund only what the mortgage on a sale consented to by him is deficient to pay."

This most equitable rule is applicable to the facts of the present case, and gives to each class of creditors a fair and equal share of the assets of the insolvent estate.

In *Bell v. Fleming's Executors*, 1 Beasley 13, Chancellor Williamson approves the rule, as a general one in claims against insolvent estates, that the creditor should be first compelled to exhaust his security before being allowed to participate in dividends, and should draw dividends only on the balance due him. He bases the rule on the broad ground that equality is equity.

*Willis v. Holland*, 36 S. W. 329, was a case where an insolvent debtor had made a conveyance to a trustee in trust to pay certain of his debts. The Court says, p. 331, that such creditors have a right to have security held by one applied to his debt before he will be allowed to participate. It must be inferred that participation would be only upon the balance.

In *Field's Ex'r. v. Creditors of Wheatley*, 1 Sneed 351, and *Winton v. Eldridge*, 3 Head 361, it is held that mortgage creditors of a decedent must first exhaust the mortgage,

and for balance share *pro rata* with other creditors in the personalty.

The same just principle of distribution is approved in two recent cases in Kansas.

The American National Bank v. Branch, 57 Kans. 27.

The Security Investment Co. v. Richmond National Bank, 58 Kans. 414.

In both cases the question arose under assignments for the benefit of creditors. In The American National Bank vs. Branch, 57 Kans. 27, the Court say, p. 35: "It would be inequitable to allow these claimants a *pro rata* dividend on the whole amount of their claims when payment of a part, if not all, of it may be received from the mortgage securities to which they have the exclusive right."

In The Security Investment Co. vs. The Richmond National Bank, 58 Kans. 414, the Court say, pp. 417, 418: "As the claimants held liens on property other than that assigned, they were not entitled to share equally in dividends with those who held no special security."

In Moore vs. Dunn's Adm'r, 92 N. C. 63, it is held that a mortgage creditor of a decedent must first exhaust his mortgage and look to the personalty for the residue. The case follows and approves Creecy vs. Pearce, 69 N. C. 67, where it is expressly held that the residue, after exhausting the mortgage, is to be paid ratably with other claims.

Some of the authorities do not require the creditor to exhaust his security before participating in dividends, but if he realizes anything from the securities it must be deducted from his claim whensoever received, and dividends paid only on the balance.

In Lowell vs. French, 54 Vt. 193, the creditor had proved for the full amount against the estate of both principal and

surety. A dividend having been afterwards paid from the principal's estate, the creditor was required to deduct it and share only upon the balance in the surety's estate. The Court say, p. 199 (italics ours): "In the distribution of an insolvent estate we see no reason why a payment made by the principal after the allowance should not be treated in the same way that it would have been if made before. In both cases the payment reduces the liability of the estate. While it is true that the payees had the right to regard the surety as a principal, and to enforce his liability as a principal until they had obtained full satisfaction, yet *where there is only a limited fund from which to obtain satisfaction, and the question is made how that fund shall be distributed, creditors whose claims are equal in right are entitled to share equally in such distribution.*"

The case of Bank vs. Alexander, 85 N. C. 352, is very similar to Lowell vs. French. It is not clear from the report whether a dividend was received from the principal's estate before proof against the surety's estate or before dividend. It was received after *insolvency* of both principal and indorser, and the Court required it to be deducted from the claim against the surety's estate.

Wheeler vs. Walton & Whann Co., 72 Fed. 966, was a decision by the Circuit Court of the United States for the District of Delaware. Judge Wales pronounced the opinion. It was a receivership case, which is virtually the same, as the court say, so far as the rule for application of collateral is concerned, as a case of assignment for the benefit of creditors. On page 967 Judge Wales says that by collecting the collateral notes before a dividend is made the creditor must credit the amount received and take a dividend on the balance only. The conflict of authorities is recognized, but in a note by the reporter it is said the court's attention was



not called to the case of *Levy v. The Chicago National Bank*, 158 Ill. 88, hereinafter cited.

*In re Estate of McCune*, 76 Mo. 200, the question arose in the administration of the assets of an insolvent decedent's estate. The language of their statute is, p. 206: "If there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts." Creditors had realized upon their collaterals *after proving* their claims, but *before distribution*. (P. 200.) The court held that conversion of the collaterals into cash operated as payment *pro tanto*, and that dividends should be made on the balance only, and say, p. 206: "Any other construction than this would clearly contravene the plain language and teachings of the statute and result in an inequality of distribution which the statute neither contemplates nor tolerates." On p. 207 the court suggests a query as to the rights of such creditors to participate if they had not collected their collaterals.

*Philadelphia Warehouse Co. vs. Anniston Pipe Works*, 106 Ala. 357, is a case where the assets of an insolvent corporation were in the hands of a receiver. After insolvency and appointment of the receiver, the Warehouse Co., a creditor, collected a large sum on its collaterals. Whether such collection was made before or after proving its claim is not clear from the statement of facts, but the court treat that fact as immaterial, and approve the rule that where collaterals are collected before dividend the dividend should be made only on the residue of the claim.

In the *London and San Francisco Bank vs. Snell, Heitshu & Woodward Co.* (U. S. Circuit Court for the District of Oregon), 83 Fed. 603, a receiver was appointed for the company upon the application of the bank, a creditor for a large amount, holding collaterals consisting of book accounts,

whose claim had been recognized by the Court by an order for payment of interest. Afterwards \$7,000 was collected upon the book accounts. The Court intimates that the weight of authority, perhaps, does not make the amount due at time of distribution the basis for dividends, but adopts that rule for the reason that the bank had received interest.

Erle vs. Lane, 22 Colo. 273, is a recent, well-considered case, where, after proof against a decedent's estate, collateral was realized upon before distribution. The Court of Probate had permitted a dividend upon the original amount of the claim. This order was reversed. The Court distinguish between cases of assignment for the benefit of creditors and cases of decedent's estates (the statutes of Colorado making creditors in assignments *cestuis que trusteni*). On page 279 the Court say, after stating that the creditor may prove for the full amount (*italics ours*): "Yet if, before or *after* the claim is proved, he disposes of the security and realizes thereby a partial payment of the claim, *he has derived all the benefit it was intended to give*, and all that, under his contract, he is entitled to receive, and it no longer exists for any purpose. In other words, if he disposes of his collateral and puts it out of his power to return it in case his debt is paid, it ceases to be collateral, *and the sum realized operates as a payment* and reduces his claim *pro tanto*. By his own voluntary act he parts with the double right the law gives him, and thereafter can proceed only for the remainder of his claim, and is entitled to dividends only on that amount."

Whittaker vs. Amwell National Bank, 52 N. J. Eq. 400, involves a large number of questions as to marshaling liens, one of which was the rights of general and secured creditors of one Jonathan Steward, who had assigned for the benefit of his creditors. It is a recent decision (1894) by Vice-Chancellor Bird. He says, p. 418: "Mr. Steward made assignment of certain securities which he held to different creditors

as collateral security for their claims. What are their rights as against the general creditors of Mr. Stewart? It is my judgment that they may file their claims with the assignee for the whole amount due them, without being compelled, in the first instance, to release their collaterals; but they are only entitled as against general creditors to a dividend out of the assets in the hands of the assignee upon the balance of their claim after having received the value of such collaterals."

The case of Thibaudeau vs. Benning, 20 S. C. Can. 110, came up on appeal from the Queen's Bench of Montreal, where it is reported in Montreal L. R., 5 Q. B. 425. It was a case under an assignment for the benefit of creditors and the question arose under the *common law*, as appears from Chief Justice Dorion's opinion in the Queen's Bench, p. 437. The Queen's Bench held, as expressed in the syllabus: "A creditor who holds notes or merchandise as collateral security is not entitled to be collocated upon the estate of his debtor in liquidation, under a voluntary assignment for the full amount of his claim, but is obliged to deduct any sums he may have received from other parties liable on such notes, or which he may have realized upon the goods; and it does not matter at what time such sums have been received on account, provided it is before the day appointed for the distribution of the assets of the estate on which the claim is made." The decision is based on the ground that sums realized upon the collateral operate as payment *pro tanto*. The Supreme Court affirmed the decision of the Queen's Bench.

In The State of Nebraska vs. Nebraska Savings Bank, 40 Neb. 342, the question arose on the distribution of the assets of an insolvent state bank. The court, after a full discussion of the question, in which they approve Amory vs. Francis and *In re Frash*, *supra*, hold that collaterals, realized upon before distribution, must be deducted and dividends

made only on the balance due, and that the creditor must surrender to the receiver the collaterals to be collected or disposed of as the court may order for the benefit of the creditor. There was no statute bearing on the subject. Referring to the contention that the creditor should be allowed to draw dividends on his full claim, the court say, p. 350: "The secured creditor would obtain an advantage over the unsecured one, to which no rule of law or equity entitles him, and which can not be accorded him without working injustice to other parties."

The following authorities hold that the creditor shall deduct from his claim the proceeds of any security realized before proving or sending in his claim to the official liquidator:

Furness vs. Union National Bank, 147 Ill. 570.

Levy vs. The Chicago National Bank, 158 Ill. 88.

*In re* Barned's Banking Co., 5 L. R. Chan. App. 18.

Fottrell vs. Kavanagh, 10 Irish Rep. Eq. S. 256.

Eastman vs. Bank of Montreal, 10 Ontario Rep. 79.

Cooper vs. Molson's Bank, 26 S. C. Can. 611.

In *Furness vs. Union National Bank*, the court say, p. 573: "The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course, this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it. If he has realized upon his collateral before filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him; that is to say, for what remains of his claim after deducting the amount realized from the collaterals."

In *Levy vs. The Chicago National Bank*, 158 Ill. 88, the

English and American authorities are reviewed, and the court expresses its conclusion as follows, p. 102: "Our conclusion is, that the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but that amounts realized from collaterals after that date are not to be deducted, subject always to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim." The court expressly dissent from the statement of the learned judge who delivered the opinion in the case at bar in the United States Circuit Court of Appeals, that there is no logical basis for any distinction between the effect of collections made from collaterals after insolvency and before filing proof, and of those made after filing proof. They show that in Illinois, at least, creditors have no such "fixed" equitable ownership in the assets as will prevent its yielding to a payment received by the creditor before he proves his claim.

The plan of proving a fictitious amount—the amount *formerly* due—in order to obtain a dividend large enough to pay what is *now* due may be logical, but it does not seem to be fair.

The English and Canadian cases cited show that this rule of distribution is well established in both England and Canada. That is to say, in both countries the creditor must *at least* credit the proceeds of collaterals received *before proving* his claim. In Canada, however, as appears from *Thibaudeau vs. Benning*, 20 S. C. Can. 110, the creditor must also deduct

all proceeds of collaterals received before *dividends*, prorating only on the balance. In England it seems to be settled by Kellock's Case, L. R. 3 Chan. App. 769, that proceeds of collaterals received after proof are not to be credited. The principal reason assigned is that the official liquidator might be tempted to delay dividends, hoping for the creditor to realize on his collaterals. We respectfully submit that this danger is not so imminent as the corresponding danger of *creditor* and *collateral debtor* agreeing to defer payment of collateral under the rule in Kellock's Case. The delay of the officer (liquidator or receiver) is *illegal*—a breach of his sworn duty. The delay of the others, creditor and collateral debtor, is but the legitimate adjustment of their private affairs so as to enable the creditor to reap the reward of a larger dividend offered by the law. He could well afford to be more lenient to the collateral debtor.

*In re* Barned's Banking Co., 5 L. R. Chan. App. 18, it is held that proceeds realized from collaterals before *formal proof* to the official liquidator must be deducted from the amount on which dividends are based, although *before the proceeds were realized* the claim had been sent by a notary public to the official liquidator for *payment*.

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Let us now refer to the authorities cited by the counsel for appellee, and see how far they justify the claim made by them.

This question is touched upon in the case of *Lewis, Trustee, vs. United States*, 92 U. S. 618.

In that case there was no question of dividends. The United States was held to be entitled to be paid in full before other creditors were entitled to anything. And the court held that this rule applied to the estate of all the partners.

The Trustee denied this right, and this was the only question arising in the case. In deciding the case, however, Justice Swayne, on page 623, says :

“ It is a settled principle of equity that a creditor holding collaterals is not required to apply them before enforcing his direct remedy against the debtor.”

This is the general rule, but no such claim is made here. But the court does not hold that equitable considerations may not vary this rule. On the contrary, it considers the considerations urged for varying it in the case before the court, and argues that such considerations are all in favor of enforcing the rule. It is scarcely necessary to say that had the United States at that time been paid part of its claim by the sale of these collaterals, it could only have asked for the balance then due to it after crediting such payment.

In the case of *Moses vs. Administrators of Ranlet*, 2 N. H. 488, referred to in complainant's brief, Justice Redfield, in deciding the case on page 489, says :

“ It is not pretended that any part of the sum allowed by these commissioners had previously been paid or released, and the only ground for its rejection seems to be the circumstance that the plaintiff has for such eventual payment collateral security. But in ordinary cases this circumstance is no objection to a suit and recovery of the whole claim, since the creditor can in no way obtain but one payment of his demand. Such it is admitted would be the case here if the debtor were alive. But the death of the debtor can not itself change the principle of justice, or the terms of the contract, and the Statute does not profess to make any change except to introduce an equal division between creditors of said estate, as belonged to the insolvent at his death.”

We submit that if part of the sum allowed by the commissioners had been paid, as in the present case, the judg-

ment of the court would have been different. Also, if the death (in the present case the insolvency) of a debtor cannot in itself change the principles of justice so as to prevent the creditor suing for the full amount due him, neither can it permit him to prove a larger claim than he could sue for and recover if death or insolvency had not intervened.

In the case of *West vs. Bank of Rutland*, 19 Vt. 403, Justice Redfield, on page 409, says:

“It is true that if the securities had been converted into money, and it is between debtor and creditor, it ceases to be collateral, and operates directly as payment, so that the debt is thereby reduced, and the creditor can only sue for the balance.”

And, again,

“In England and in this country in such case the court of chancery will oftentimes compel the party to apply the funds in his hands, and only proceed against the other funds for the balance, and if the funds are not money, will require them to be reduced to money, but in no case where it is merely collateral will a court of equity compel its application, unless the debtor stands in the relation of a co-surety.”

The cases of *Finley vs. Hosmer*, 2 Conn. 350, and *Walker, Smith & Co. vs. Barker*, 26 Vt. 711, are similar as to the facts. In both cases the claims had been presented and allowed. The creditors held mortgage securities for their debts. They afterwards foreclosed their mortgages, in both cases the court held that they were entitled to dividends on their full claim; but, as will be seen, they had received nothing at the time their claims were presented and allowed.

In the case of *Allen vs. Danielson*, 15 R. I. 480, the court also held that the party was entitled to a full dividend upon his claim, without regard to the collaterals held by him. In this case the payment from the collaterals was not made until



after the second dividend had been declared. This case is in direct variance from a decision of the same court made a short time previous, and to which we have already referred.

Counsel for complainant cites also a number of cases decided by the Supreme Court of Pennsylvania.

The foundation case cited and followed is Miller's Appeal, 35 Pa. St. 481. After an assignment in trust for creditors, one of the creditors attached a legacy, which was left to the insolvent debtor after the assignment, and having applied it on his debt, was thereafter permitted to prove for the original amount of his claim. Mr. Justice Strong says, p. 483: "It is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an *owner* by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust and after his ownership had become vested, it would seem, must be immaterial. If it be suggested that the whole debt due Miller might have been paid by the assignor after the assignment and before distribution, the answer is at hand: Miller's right to participate in the distribution at all is only a right in equity, it requires the aid of a chancellor, and that aid will not be given if the whole debt is paid."

That creditors have equitable rights in the trust fund, that they are in a sense *cestuis que trustent*, is clear. But that they are *owners*, with an ownership so fixed and absolute that it is entirely independent of the debt out of which their interest grows, unless the whole debt is extinguished, is not so clear. If "the amount of the debt due to him is important *only as it determines the extent of his ownership*," how can that debt have sufficient force and validity to be the foundation of an action to subject the legacy to its payment? If it is not *all* in full force and validity, how much of it is? Is it not clear

that if the legacy had been not more than sufficient to pay the whole debt, the creditor could have recovered the full legacy? If, however, the debt *is* in full force, how can the creditor retain his claim unimpaired and undiminished, and at the same time *own* some of his debtor's property? Does the law or equity transfer property from the debtor to the creditor without affecting the debt? Again, suppose that the assets in the hands of the assignee should be stolen or lost by a cyclone, upon what *owner* would the loss fall? Such loss would disappoint and injure the creditor, but would no more affect his claim than if the property were being transmitted by the debtor's own agent instead of through the agency of law.

We respectfully submit that the answer of the learned Justice to his own suggestion, about the effect of full payment of the debt on ownership, is not sufficient. It says, in effect, that although this doctrine leads to a logical absurdity, the chancellor can avoid the consequences. If the debt, as it is reduced by payment, is permitted to measure the right to dividends, there will be no absurd consequences to require the chancellor's intervention.

The difference between paying the creditor a dividend upon his *whole claim* when it has *all* been collected, and paying the same dividend when a *part* of the debt is in his own pocket, seems to be not a distinction in equity, but simply a difference in the *degree* of injustice to other creditors.

When it is once admitted, as it is in Pennsylvania, Assigned Estate of Wilhelm, 182 Pa. St. 281, that the principal debt is in part *extinguished* by the proceeds of collateral received by the creditor, the whole argument, based on the right of the creditor to follow the assets as he could have followed the debtor, is inapplicable, and the logical advocate of the collaterally secured creditor's right so to manipulate his

claim as to obtain dividends on the original amount is forced to resort to some technical theory which will give the creditor rights independently of the *debt*. The "fixed ownership" theory meets the situation. Any theory, which permits a creditor to obtain the full benefit of a whole claim when part of it is gone, seems utterly subversive of that nursery maxim of political economy, "You can not eat your cake and have it too."

Although this Pennsylvania doctrine has been repeatedly asserted by its courts, they have thrice failed to enforce the rigor of its logic.

In Sweatman's Appeal, 150 Pa. St. 369, a prospective landlord, at the request and for the accommodation of a prospective tenant, purchased a lot and erected a building for the tenant, under an agreement that the tenant should lease the premises for a term of years to compensate the landlord. The lease was executed, binding upon executors, administrators and assigns, with covenants to pay rent and to terminate the lease for breach of covenants or conditions, without release of damages for such breach. Prior to the termination of the lease the tenant made an assignment for the benefit of his creditors, and the assignee abandoned the premises. The landlord was permitted to prove a claim for damages for failure to compensate him for his investment. Here there was no breach of any agreement *at the time of the assignment*. If creditors at the time of the assignment have a fixed ownership it is difficult to see how the landlord had any standing as a creditor.

In the Assigned Estate of Wilhelm, 182 Pa. St. 281, above cited, as to the effect on the debt of realizing on collaterals, the chancellor did even more than was suggested he might do by Mr. Justice Strong, in Miller's Appeal. The Court would not permit the creditor, whose claim was partly

paid by collateral realized after the assignment, although the creditor even refused to apply the proceeds of the collateral on his claim, to claim *interest* against the estate, to which he would have been entitled but for the payment. A very just decision, but justice came from the chancellor and not from the "fixed ownership" doctrine.

In a case decided by the Pennsylvania Superior Court, composed of seven Judges, *In re Wetzler's Estate*, 3 Pa. Sup. Ct. 435, a creditor had obtained judgment against his debtor and levied execution on personal property, after which the debtor assigned for the benefit of his creditors. Before dividend the creditor realized part of his claim out of the sale on execution. With this in his pocket he asked for a dividend on his whole claim. The Court unanimously held that it should be deducted and his dividend paid only on the balance. The decision was based, not on the ground that the levy was a satisfaction *pro tanto*, but on the ground that the personal property levied upon did not pass to the assignee.

It seems that the Pennsylvania theory does not work smoothly in its practical application.

In favorable contrast with the case of Miller's Appeal is the case of Combs vs. Union Trust Co., 146 Ind. 688. There the creditor, after an assignment in Indiana, went into another State and collected part of his claim by attaching property, which, however, was owned by the debtor at the time of the assignment. The Indiana Court applied the proceeds, not on his claim, but on his *dividends* in the assignment case.

But if the Pennsylvania theory is correct as to an assignee in insolvency, it ought not to be applied to the receiver of a national bank and to the Comptroller of the Currency, who is required to make "a ratable dividend," and has not the power of a chancellor to neutralize the injustice of a logical theory.

Outside of Pennsylvania the authority for appellee's contention is meager.

In the case of *Brown vs. Merchants' Bank*, 79 N. C. 244, there was a claim against the estate of McMurray & Davis. It was claimed that payments made by the estate of Greer & Alexander, who were endorsers on the paper which was the foundation of the claim, should reduce the amount to be allowed. Two points appear from the opinion :

No payments were made from any source upon the debts provided for in the assignment of March 8, 1875 (that of Greer & Alexander), before the assignment of McMurray & Davis was made, and the dividend was made long afterwards. Second, the payments were made by the sureties and not by the principals.

In the case of *Kellogg vs. Miller*, 22 Oregon, 406, the claim was secured in part by mortgage; no payments had been made upon it. The Court held that it could not compel the creditor to foreclose the mortgage before receiving a dividend.

In Michigan two cases are cited.

In the case of *The Southern Michigan National Bank vs. Byles*, 67 Mich. 296, the claim was proven January 17, 1884, but the payments which it was attempting to have credited on the claim were made afterwards.

In the case of *Bank vs. Haug*, 82 Mich. 327, the debt was proven April 16, 1889; a dividend was declared June 26, 1889, and paid to all but the plaintiff in that case. The payment to the creditors was made December 2, 1889. On page 610 the court says :

"The question here presented is an interesting one. If it were new in this State much could be said, and many authorities cited in support of either position; but we think the

question is ruled by the case of *Southern Michigan National Bank vs. Byles*, 67 Mich. 296."

The case of *Morton vs. Caldwell*, 3 Strobh., Chy., 162, was itself a reversal of the decision of the lower court, and so far as the questions involved in the present discussion are concerned, is clearly reversed by the same court in a later case already cited in this brief. In that case, however, it was not a question of collection from collaterals, but as between the makers and endorser of a promissory note whether a collection from one would reduce the dividend from the other.

The case of *People vs. Remington*, 121 N. Y. 328, is also relied upon. In that case it was held that a creditor of an insolvent corporation whose assets were in the hands of a receiver, had a right to prove and have dividends upon his entire debt, irrespective of collateral security held by him.

It is claimed that in this case there had been payments made before the claim was proven. But this, we think, is not the case, for, on page 332, the court in stating the question involved, says it is

"Whether the receiver, as the personal representative of the insolvent, could reduce the claim of the creditor for the purposes of a dividend by compelling a deduction from the amount of the proved debt of the value of collateral securities or any proceeds thereof."

The inference from this language, we think, is clear that the proceeds referred to were collections after the debt was proven but before the dividend was declared, and in confirmation of this view, on page 336, the court states its conclusions thus:

"The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend on that amount."

And on page 334 it says:

"Then on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor can not under those circumstances enforce his direct claim against the debtor until he has realized on his security?"

Will it be claimed that if the debtor had not become insolvent that the creditor could have sued upon his entire claim without crediting the collections made from collateral prior to bringing suit?

And also on page 335, after quoting the case of *Greenwood vs. Taylor*, the court says:

"In equity, however, a party may come in and prove without giving up or affecting his security, except so far as the amount of his debt may be diminished by what he may receive."

And in the report of the same case in 54 Hun., 511, the court says:

"It does not appear that any of the money received from the sale of the pledged property has been applied to the payment upon the debt, either by the agreement with the receiver or by any claim to that effect made by the bank alone."

This review of the various authorities in the courts of the United States, we think fully sustains the claim made by the receiver in the present case. Not a single case clearly holds that a creditor can prove a larger claim than is actually due to him when he presents it, except one or two of those in Pennsylvania; and they are based upon a legal claim arising out of the character of the deeds of assignment, which does not exist in the case of receivers of national banks.

And why should this not be so? Why should a creditor

be permitted to prove for a larger sum than is actually due to him at that time? Why should a different rule be established in cases of payments realized from collaterals and payments made from any other mode?

Equality among creditors is the general rule of distribution adopted as to the assets of all bankrupts. This rule is especially applied to a distribution of the assets of insolvent national banks. Why should the courts attempt to evade this rule in favor of a special creditor, as is attempted to be done in the present case? The sentiments expressed by the eminent judges who decided the cases already cited, and the universal provisions of the bankrupt laws both in England and in the United States indicate the views of jurists and legislators upon this subject; and agree in the position that equality among creditors requires that one party shall not be entitled to receive full dividends upon his entire claim and also the payments he may receive on it from securities held by him, whether such payments were received before or after the presentation of the claim, provided only that they were received after bankruptcy occurred. The principles adopted in the bankrupt laws should be adopted in all equitable proceedings as the proper rule. It is just and fair to all. It gives to the creditors holding securities the full benefit of that security and places them as to the portion not secured on a perfect equality with other unsecured creditors.

If in the opinion of this court the established rules of equity prevent it from applying the principles of the bankrupt laws in their entire extent by compelling creditors to exhaust their security first, and prove for the balance only, it can at least as in bankruptcy limit the dividends to the amount actually due when such dividends are declared, or if not that, then to the amount due when the claim is presented and proved.



As said before, the almost universal doctrine established by these cases sustains the decision of Judge Sage that all payments made prior to the proof of claim must be credited and reduce the amount to be allowed. But the majority of the cases go further and sustain the claim made by the receiver on his appeal. Payments made after the proof of claim and before the payment of a dividend to the creditors should have the same effect as if made before the claim was presented to the receiver. The same principle of equity, the same propriety to conform the distribution of the assets of insolvent national banks to the laws of the United States regulating bankrupt estates require that a creditor should receive dividends only upon the sum actually due to him. Such would be the rule applicable if the bank had not become insolvent. In that case at any time the claim would be the amount of the original indebtedness after deducting all payments made from that sum. And as creditors claim the same right that they would have if the bank had remained solvent, it is but just that they should submit to the same rule as to the amount due as would then apply. It is true that a creditor who holds collaterals may sue his debtor for the entire claim without reference to the collaterals, and although such collaterals may be more than sufficient to pay his debt, but it is equally true that the moment he receives a dollar from those collaterals he must credit it, and can then only sue for the balance remaining after such credit. There is no reason why the same rule should not apply after the debtor has become insolvent as before. At no time should he be permitted to receive a dividend upon more than is then actually due.

But this is not a new question to this honorable court. It was involved in a case of great importance where the interestss of the United States required the application of the

rule that dividends should be paid by the receiver of a national bank regardless of collateral realized upon after the insolvency of the bank. This plan of distribution was not suggested by counsel in the case, but the language of Mr. Justice Field indicates how the suggestion would have been treated if made.

Cook Co. National Bank vs. The United States, 107  
U. S. 445.

So far as the case cited bears on the question, the facts are as follows: At the time of the suspension of The Cook County National Bank, January, 1875, the Treasury Department of the United States held \$150,000, par value, of United States bonds belonging to the Bank *as security* for all public moneys therein deposited. These bonds were, after the receivership, duly sold for \$174,544.52 by the Treasury Department, and after paying *in full* the amount on deposit with the Bank to the credit of the Treasurer of the United States, there remained a balance of \$19,239.05. At the time of failure the Bank had on deposit, of postal funds, \$24,900, and of money-order funds, \$14,684, deposited by the Deputy-Postmaster of Chicago. The Treasury Department applied the balance, \$19,329.05, ratably on these two funds, leaving a balance due from the receiver on account of the two funds of \$20,344.95. The officers of the United States being in doubt whether the said balance was a preferred debt under the U. S. Statutes, the United States filed a bill in the Circuit Court of the United States for the Northern District of Illinois against the Bank and its receiver, asking for a decree directing the disposition of the funds of the Bank in the control of the Treasury Department for distribution. The defendants treated the bill as if filed to obtain a *priority* in the payment of the *balance* due for postal funds and money-order funds. A demurrer to the bill was overruled by the Circuit

Court and appeal was taken to the Supreme Court of the United States, where the demurrer was sustained and the cause remanded for a dismissal of the bill. While the only question expressly considered was the question of priority, yet the scope of the bill was large enough to authorize a decree for a dividend upon the original amount of the claim for postal and money-order funds, if the United States was entitled to that relief, but no such decree was entered. Mr. Justice Field says, p. 449 (italics ours): "With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, *if it prove insufficient*, take the position of other creditors, in the distribution of the assets of the bank *in case of its failure*."

The italicized words indicate pretty strongly that the learned Justice did not disapprove of the treasurer's act in first exhausting the security and paying one claim *in full*, thereby disabling it, even under the Pennsylvania theory, from participating in dividends, nor is there the slightest suggestion that the claim for postal and money-order funds should be recognized for dividends in any larger sum than the amount due after applying the balance of the proceeds of the security.

While it does not appear in the record what assets the receiver held or what dividends he paid, it does appear that if the officers of the Treasury Department had withheld the full security, as appellee in the case at bar desires to do, a dividend of only eleven percent on the entire claims, together with the proceeds of the security, would have paid all the claims of the United States in full.

Counsel for the Chemical National Bank object to crediting on its claim the amount paid on the collaterals for another reason. They claim that the collaterals were not the prop-

erty of the Fidelity National Bank, and that, therefore, that bank is not entitled to a credit from their proceeds.

In the first place the collaterals were sent to the Chemical National Bank by Mr. Harper, the Vice-President of the Fidelity, in the same letter in which he asked for the loan of three hundred thousand dollars, and were sent to the bank as collateral to that loan. The Chemical received them as the property of the Fidelity, and treated them as its property. It credited the amount collected to it, and confessedly had no knowledge or suspicion that they belonged to any one except the Fidelity Bank. It does not pretend that any one at that time, or since, claimed any interest in those collaterals; and as against the Fidelity National, it has no right to deny the ownership of the latter any more than a lessee has the right to deny the ownership of the lessor in the property leased. It can only account for the collaterals to the party from whom it received them. And having received them from the Fidelity, it is under a legal obligation to account for them to it, and on the loan as collateral for which it received them.

Had a third party pledged these collaterals with the Chemical as security for the loan to the Fidelity, then ordinarily the claim made would be correct. The reason of the rule is that payments made under such circumstances not being made by the principal debtor, it is no payment of his indebtedness, and it is, therefore, immaterial to him whether the entire indebtedness is proved by the original creditor, or part by him and the balance by the surety who has made the payment. But this only applies to the case where the apparent debtor is in reality the principal debtor; not to a case where such debtor is a surety merely for the third party who made the payment; or when the circumstances of the case entitle him as between such principal and the party mak-

ing the payment to call on the latter to pay the debt. The doctrine is clearly stated in a case already cited,

*In re Southier*, 2 Lowell, 320.

In that case Justice Lowell reviews the authorities on that question, and in conclusion says :

"The better opinion at common law is that a payment made by a drawer or endorser does not exonerate the acceptor or maker unless the promise of the latter was made for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment."

This statement of the case is so in accordance with justice and the established principles of equity that we do not deem it necessary to cite further authorities. The reason of the rule referred to is that the party paying could in the one case prove a claim for the sum paid by him if the credit was allowed on the original debt. If this could not be done the reason of the rule wholly fails.

In the case at bar the money was borrowed by E. L. Harper in the name of the bank, but for his own use without any authority from or knowledge of the other officers of the bank, and by the perpetration of a fraud upon the bank, and the proceeds of the loan were immediately placed to his individual credit, and drawn out for his own use. It must be perfectly clear that if Harper had paid this debt, or any part of it, he could not have proved the sum so paid as a claim against the Fidelity National Bank; and the same rule applies to collaterals furnished by him either belonging to or controlled by him.

It is immaterial that this relation of the parties and the fraud perpetrated by him were not known to the complainant. In the case cited, the party making the payment appeared

to be the endorser, and it is not shown that any different relation was known to the holder of the paper. Yet it was permitted to be shown that although apparently an endorser, he was the party who should have paid the entire debt. And by the Statutes of Ohio in a suit on a promissory note against makers and endorsers, the law permits either party to offer evidence as to the real character of their obligation, and to have the judgment entered as surety against the one who in reality is surety, whether he appears in that relation on the paper or not.

Again, in the present case, the complainant supposed that these collaterals did belong to the Fidelity National Bank. This would naturally have been inferred by the complainant from the manner in which it obtained possession of them; the manner in which they were sent to it. The Chemical National Bank can not therefore complain if the same result should follow as would have followed had they actually belonged to the Fidelity Bank.

But what right has the appellant to make such a claim? It received the paper from the Fidelity National Bank, and has collected on it the sum of seventy-five thousand dollars, which it credited to that bank on account of the loan made by it, and no party has at any time made any complaint of this credit or contested the right of the Chemical bank to hold the money. It has seventy-five thousand dollars collected on account of this loan, and no harm is done to it by compelling it to credit it on that account so as to reduce the sum due to it.

### III.

We maintain that the Chemical National Bank, in addition to the amount actually realized from collaterals, should be charged with the sum of \$25,000, as of date June 28, 1887, on account of its negligent failure to present the Wilshire-Lewis note for payment on that date.

As to this fourth note, and which was the one matured first, June 28, the Chemical National Bank was the agent of the Fidelity to collect it, and if not paid at maturity to take the proper steps to fix the liability of the endorser on the paper.

It can not excuse its negligence to its principal by the claim that possibly if the note had been duly presented Lewis might not have paid it, and possibly if after the suit had been brought upon it a valid defense might have been made by the parties. The three notes which were duly presented for payment were promptly paid at maturity. And we have the right to presume that the other would also have been paid if the same course had been adopted. If the Fidelity Bank was interested in the payment of the other note, it had the right to be placed by its agent in the position which would entitle it to present and enforce its claim by suit. But by the negligence of its agent it can not make any claim against Lewis upon this note. The Chemical National Bank can not excuse its negligence by any such pretext as is made in this case.

But was the appellant guilty of negligence? The note was dated at Cincinnati, and was payable in bank at that place.

It seems hardly necessary to refer to authorities upon

this question. The duty of the Chemical Bank is thus stated by Daniels on Negotiable Instruments, section 327:

"It is the duty of the Bank, as soon as the bill, note, or check is placed in its hands for collection, to take appropriate steps necessary to its prompt payment or prompt acceptance, by making presentment for acceptance without delay, and presentment for payment at maturity. And if the instrument be not duly accepted or paid, the bank must take all necessary steps to fix the liability of the drawer, if it be a foreign bill, by placing it in the hands of a notary for protest, and by giving due notice of its dishonor to the party who endorsed the instrument to it for collection, whether it be a bill or note, inland or foreign. If the bank fail in any of these duties, it becomes immediately liable in damages to the holder."

This paper was left with the Chemical National Bank. It was its duty to present it for payment at the place where it was payable, and if not paid, to have the endorser properly notified so as to fix his liability. It did not do this; but retained the paper in New York until the day when it was due.

By this negligence, all of which is shown by the testimony of William J. Quinlan, the cashier of the Chemical Bank (Rec., p. 41), the sum of \$25,000, which might have been realized out of the paper belonging to Harper, the real debtor, was lost.

The pretended excuse for not presenting the note for payment at Cincinnati, where Wilshire, the maker, lived, was the telegram of May 19, "Will want all returned here without presenting, as we advised parties to arrange payment here;" and the letter confirming this, which says, "Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here." The paper in question was not payable in New York,



but in Cincinnati, and was not, therefore, covered by the direction not to present. But the directions were, "we want all returned without presenting," and "we have advised parties we would order back." The only authority contained in these letters was to return the paper to Cincinnati. The Chemical was authorized to return this note to the Fidelity Bank, if the latter had not failed. But it did not authorize it to retain the paper in New York and take no steps to charge the endorser with liability.

If the Fidelity did not order the paper back, it was the duty of the Chemical to send it to a proper collecting bank for presentment for payment. This it did not do.

But the Fidelity National Bank failed on June 21, 1887, and the Chemical knew it. Mr. Quinlan testifies that he knew that the Fidelity was in the hands of the Receiver on the 21st of June. Indeed, on the 18th of June the Chemical Bank was garnisheed by the Bank of Montreal in an action brought by it in New York against the Fidelity Bank.

The authority, if there was any, to return the collateral paper to the Fidelity Bank was abrogated by the failure of the bank and the appointment of a receiver. This very authority to return the paper to Cincinnati was coupled with the promise to send other paper in its place. And it was argued by counsel that the Chemical Bank was under no obligation to return the paper until the paper to replace it was sent. But the Chemical Bank knew that the receiver had no authority to substitute other paper for this collateral paper; and hence that that condition could not be complied with. The Chemical Bank, then, neither made proper efforts to charge the endorser, by having the paper presented for payment, nor did it return it to the Fidelity. So that in no view of the case can it escape the charge of gross negligence in this matter. Being guilty of negligence, its liability is

stated by Daniels on Negotiable Instruments, section 329, to be, "That loss is *prima facie* the amount of the bill or note placed in its or his hands."

This liability is in favor of its principal from whom it received the paper.

#### IV.

At the time of the rejection of the claim of the Chemical National Bank by David Armstrong, Receiver of the Fidelity National Bank, April 25, 1890, he made an offer to accept proof of a claim for \$200,000, part of the amount claimed by the Chemical Bank, with a provision for abiding the result of judicial action as to the residue of the claim (Rec., p. 81 and p. 89, Armstrong Exhibit No. 3).

Had the Chemical Bank accepted the offer it would have received dividends on \$200,000 and not waived any of its rights as to the residue of the claim. Ordinarily when a claim is rejected, and it is subsequently allowed by a Court, interest is allowed on dividends the claimant should have received from the time they should have been paid. The object is to place all creditors on an equal footing.

Armstrong vs. American Exchange Bank, 133 U. S. 433.

But the offer to pay a part ought, in equity, to stop interest *pro tanto*.

No right of the Chemical Bank was to be affected by the acceptance of the receiver's offer.

The counsel for appellant claims that under the offer of the receiver, the Chemical "must waive so much of the decision of the Court below as was in its favor, and consent beforehand to settle as if the receiver had succeeded *in toto*."

But this is not a fair construction of the receiver's offer, nor was any such claim intended. The offer was to pay dividends on \$200,000 at that time; the balance was to be de-

terminated by the decision of the Court upon the questions at issue.

The claim that all sums thereafter received from collaterals should be applied to reduce the amount of said claim, was only to take effect in case the Court held that the receiver had that right. The Chemical chose to accept nothing, but to bring suit for the full amount. It made no answer to this offer. It did not attempt to remove any obscurity which it might claim existed in the language used by the receiver.

Nor does the fact that the receiver subsequently contested the whole claim, as he was in duty bound to do, seem to us to justify a judgment for interest on such dividends as he offered to allow. The complainant preferred to put the whole claim in litigation. If the litigation has been retarded by the contest of the *whole claim* more than it would have been by litigating the matters proposed to be litigated by the receiver in his offer, the extra delay is directly chargeable to complainant's refusal of the offer. If the litigation has *not* been prolonged to any extra degree by a contest of the whole claim, then the receiver is not responsible for any delay by denying the validity of the entire claim. The Circuit Court assessed a large amount of interest against the receiver for the sole reason that he contested the whole claim instead of such portion as he originally refused to allow. We respectfully submit that it was error to do so.

On the whole case we claim that the judgment of the Circuit Court of Appeals should be reversed and the bill of the complainant dismissed.

Respectfully submitted,

JOHN W. HERRON,  
FRANCIS F. OLDHAM,  
Counsel.

February 9, 1899.

Case No. 24, 1898.

# Supreme Court of the United States.

JOHN H. HARRIS, RECEIVER OF FIRST NATIONAL BANK,

vs. JAMES H. HARRIS, Plaintiff in Error,

THE FIRST NATIONAL BANK OF NEW YORK,

Defendant in Error.

Case No. 24, 1898. — on Motion to Remand the  
Case of Error.

W. O. HARRIS,

JOHN HARRIS,

Plaintiff in Error.

IN THE

# Supreme Court of the United States.

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S. R. COCKRILL, RECEIVER OF FIRST NATIONAL BANK,  
OF LITTLE ROCK, Plaintiff in Error,

*v.*

UNITED STATES NATIONAL BANK, OF NEW YORK,  
Defendant in Error.

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**Brief for Defendant in Error, on Motion to Dismiss the  
Writ of Error.**

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This case has been three times tried by the Circuit Court. On the first and second trials, the judgment was against the United States National Bank. These were each reversed by the Court of Appeals for the Eighth Circuit. (64 Fed., 985-992 and 79 Fed., 296). The third trial resulted in a verdict and judgment for the United States National Bank. The receiver took a writ of error to the Court of Appeals, where this judgment was affirmed, on the authority of the two former opinions, and the receiver has brought error to this Court.

The United States National Bank, the defendant in error, has filed the following motion to dismiss the writ of error:

SUPREME COURT OF THE UNITED STATES.

S. R. COCKRILL, Receiver of First National Bank of  
Little Rock, Plaintiff in Error,

*v.*

UNITED STATES NATIONAL BANK, of New York, Defendant in Error.

The United States National Bank, defendant in error in this cause, moves the Court to dismiss the writ of error to this Court in this cause, because it says the jurisdiction of the Circuit Court in which the case was tried, depended alone upon the diverse citizenship of the parties and the judgment of the Court of Appeals is final, as will appear from a copy of the complaint in this case, and one of the notes sued on (all the notes being of like nature), as follows :

“UNITED STATES CIRCUIT COURT WESTERN DIVISION,  
EASTERN DISTRICT OF ARKANSAS.

UNITED STATES NATIONAL BANK, OF CITY OF NEW YORK,

*v.*

FIRST NATIONAL BANK OF LITTLE ROCK and  
STERLING R. COCKRILL, Receiver.

The said plaintiff United States National Bank, states that it is a corporation duly incorporated under the

laws of the United States and resident, located, and doing business in the city of New York, State of New York; that the defendant First National Bank of Little Rock is a corporation organized under the laws of the United States, resident and located and lately doing business in the city of Little Rock, in the Western Division of the Eastern District of Arkansas. Said defendant bank has become insolvent and the defendant, S. R. Cockrill, who is a citizen of Arkansas and resident of said city of Little Rock, has been appointed receiver of said bank.

On December 7, 1892, The City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the State of Missouri, its three promissory notes each for \$5,000, payable four months from date, with interest at the rate of ten per cent per annum from maturity until paid. Said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff.

That on December 7, 1892, the McCarthy & Joyce Co., a corporation resident in the city of Little Rock, Pulaski County, Arkansas, executed and delivered to James Joyce, a citizen of the State of Missouri, its two

promissory notes each for \$5,000, payable to his order at four and five months respectively after date with interest from maturity at the rate of ten per cent per annum until paid; said Joyce afterwards indorsed said notes to the defendant First National Bank and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff. Said notes were each at maturity presented at the First National Bank in Little Rock, Arkansas, for payment and payment being refused, they were each duly protested for nonpayment, the fees for which amounting to \$25 were paid by plaintiff. Copies of the said notes with the indorsements thereon, are hereto attached, marked 1 to 5 inclusive, and made a part hereof. No part of said notes have been paid and the same have been presented to the receiver of said bank for allowance, which he refused to do.

Wherefore, plaintiff prays judgment for its debt and for all other relief.

RATCLIFFE & FLETCHER.

For Plaintiff."

"\$5,000. 34,131.

"Little Rock, Ark., December 7, 1892.

"Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars for value received, negotiable and payable without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest at



the rate of ten per cent per annum from maturity until paid.

“CITY ELECTRIC STREET RAILWAY CO.,

“H. G. BRADFORD, Pt.,

“W. H. SUTTON, Secretary.”

No. A, 73,485. Due April 7-10, 1893.

The following indorsements appear on the above note: “Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Ark., H. G. Allis, Pt. Pay W. D. Hearn, cashier, or order for collection, H. G. Hopkins, cashier. Protested for nonpayment, April 10, 1893, A. S. Reaves, Notary Public. Fees, \$4.94.”

The above is a copy of note marked 1 and its indorsements, which is attached to complaint.

W. C. RATCLIFFE,

JOHN FLETCHER,

*For Defendant in Error.*

It has been settled by this Court that in cases of this kind the jurisdiction must clearly and affirmatively appear from the statements contained in the complaint. The test is whether or not the complaint on its face would be good on demurrer or motion to dismiss for want of jurisdiction. No question subsequently raised in the progress of the case will give the Court jurisdiction.

Press Publishing Co. v. Monroe, 164 U. S., 105.

*Ex parte Jones*, 164 U. S., 691.

Colorado Central Consolidated Mining Co. v.  
Turck, 150 U. S., 138.

Metcalf v. Watertown, 128 U. S., 586.

Borgmeyer v. Idler, 159 U. S., 412.

State of Tennessee v. Union & Planters' Bank,  
152 U. S., 454.

Postal Telegraph Cable Co. v. Alabama, 155  
U. S., 482.

East Lake Land Co. v. Brown, 155 U. S., 488.

Chappel v. Waterworth, 155 U. S., 102.

St. Paul, M. & M. Ry. Co. v. St. Paul & N. P.  
R. Co., 68 Fed., 2.

Caples v. Texas & P. Ry. Co., 67 Fed., 9.

Pacific Gas Co. v. Ellert, 64 Fed., 421.

The complaint specifically sets forth the diverse citizenship of the parties and on that fact alone did the plaintiff in the trial Court base the jurisdiction of that Court.

The only issue presented by the complaint is one of fact as to the indorsement of the notes sued upon by the First National Bank and nonpayment. The determination of these facts for or against the plaintiff settles the question as to the liability of the bank, and ends the suit. There is nothing in this upon which a disputed question can arise as to the construction of the constitution or statutes of the United States.

Gold-Washing Co. *v.* Keyes, 96 U. S., 199.

Theurkauf *v.* Ireland, 27 Fed., 769.

Austin *v.* Gagan, 39 Fed., 626.

State of Iowa *v.* Chicago, M. & St. P. Ry. Co.,  
33 Fed., 391.

Starin *v.* New York City, 115 U. S., 248.

Murray *v.* Bluebird Mining Co., 45 Fed., 385.

Southern Pacific Ry. Co., *v.* Whittaker, 47  
Fed., 529.

Butler *v.* Shafer, 67 Fed., 161.

In *Starin v. New York*, 115 U. S., 257, the court said :

“If, from the questions, it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term \* \* \* otherwise not.”

In the *City of New Orleans v. Benjamin*, 153 U. S., 423, this court said: “When a suit does not really and substantially involve a dispute or controversy as to the effect or construction, upon the determination of which the result depends, then it is not a suit arising under the constitution. \* \* \* The judicial power extends to all cases in law and equity arising under the constitu-

tion, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis."

In *State of Iowa v. Chicago, M. & St. P. Ry. Co.*, *supra*, Judge Shiras said: "The jurisdiction of this court either by original process, or by removal, in the class of cases under consideration, depends solely upon the fact that the controversy between the parties requires, for its *final determination*, the construction of some provision of the constitution, laws, or treaties of the United States, and the application thereof to the facts of the particular case, in such sense that the ruling thus made will materially affect the conclusion reached upon the controversy between the adversary parties to the litigation. Unless from the record it clearly appears that the *federal question must be met and decided, before the issue or issues in the particular cause can be finally disposed of*, it cannot be said that the matter in dispute arises under the constitution or laws of the United States within the meaning of the statute." (Italics are ours).

The fact that the receiver was made a party to the suit does not give jurisdiction. To every intent and purpose the suit was against the bank, and the only interest which the receiver has in the case is to represent the bank. When the questions involving the bank's liability are determined, but one result can follow.

The bank and receiver were both proper, though not necessary parties. The purpose of the suit, as shown by the complaint, was simply to establish the claim of the plaintiff against the First National Bank. Plaintiff seeks to acquire no lien nor to establish any preference, and the judgment in the case gives it none. It must simply take its place with other creditors whose claims are allowed or proven, and await the action of the comptroller in the distribution of the assets realized by the receiver.

*Green v. Walkill National Bank*, 7 Hun., 63.

"It is not sought to make the receiver liable, but to make the bank liable through the receiver."

*Turner v. Bank of Keokuk*, 26 Iowa, 562, 568.

The case of *Tehan v. First National Bank*, 39 Fed., 577, is in point. The court, in refusing to sustain the jurisdiction, said: "The nature of the action is the same as if the defendant Hayes were the receiver of a state bank or of an individual."

"The receiver has no prerogative right to be sued in the United States Court."

*Bird's Exectuors v. Crockman*, 2 Woods, 32.

*Van Antwerp v. Hubbard*, 8 Blackf., 282.

We have argued the case as if the complaint showed that the receiver was appointed by the Comptroller of the Currency. While it is a fact that the

receiver was thus appointed, the complaint does not show by whom the appointment was made.

Any court may appoint a receiver.

W. L. M. M.

by Skottow

W. L. 490

Wright v. Merchants Nat. Bank, 3 Cent. Law Journal, 351.

Thompson's Nat. Bank Cas., 321.

Irons v. Manufacturers Nat. Bank, 6 Biss., 301.

Respectfully submitted,

W. C. RATCLIFFE,

JOHN FLETCHER,

*For Defendant in Error.*

IN THE  
Supreme Court of the United States.

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S. R. COCKRILL, Receiver of the First  
National Bank of Little Rock, Ark. . . . Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK OF  
NEW YORK. . . . Defendant in Error.

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Brief for Defendant in Error in Reply on Motion  
to Dismiss.

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This action is not against the receiver as the sole defendant.

The complaint is against both the First National Bank and the receiver. While no service was had against the bank, its appearance was entered after the receiver answered, and it, with the receiver, filed an amendment to the answer previously filed by the receiver, as follows:

"In the United States Circuit Court, Western Division of the Eastern District of Arkansas.

AMENDMENT TO ANSWER.

United States National Bank,

v.

First National Bank *et al.*

By way of amendment to the answer filed heretofore herein,

defendants allege that the name of the defendant bank was endorsed on said notes by H. G. Allis for his personal benefit without authority from said bank; that said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; if said transaction created an indebtedness against the defendant bank, then the total liability of the defendant bank to the plaintiff by virtue thereof, exceeded one-tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business, which either the plaintiff or the defendant bank was authorized to carry on; that the plaintiff is not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank.

Wherefore it prays as in its other answers filed herein.

S. R. COCKRILL,  
ASHLEY COCKRILL,

*For Defendant."*



The record also shows the following orders in the case:

“On May 26, 1896.

United States National Bank of the City of New York,

v.

First National Bank of Little Rock, and S. R. Cockrill, Receiver.

Comes the plaintiff, by Ratcliffe & Fletcher, Esqrs., its attorneys, and files herein its motion to strike from the files the amendment to the answer, and also demurrer to the said amendment, and come the said defendants, by S. R. Cockrill and John McClure, Esqrs., their attorneys, and said motion to strike and demurrer are heard, argued and submitted to the court, and the court being well and sufficiently advised in the premises, considers that the same be overruled, to which ruling of the court the plaintiff, by its attorneys, excepted.

And both parties announcing themselves ready for trial, a jury came, to-wit: C. T. Young, F. M. Adams, J. M. Palmer, H. C. Philips, A. D. Billings, L. C. O'Barr, Henry H. McCray, Elisha Ives, W. P. Hunter, E. S. Ellis, G. W. Wagnon, and William Williams, being twelve good and lawful men of the district, who were duly tried, empanelled and sworn well and truly to try the issues joined between the plaintiff and the defendant, and a true verdict give according to the law and the evidence, and thereupon the jury proceed to hear the evidence as well on the part of the plaintiff as of the defendants, and the trial thereof not being concluded the same continued until to-morrow morning at 10 o'clock.”

“May 27, 1896.

United States National Bank of the City of New York,

v.

First National Bank of Little Rock, and S. R. Cockrill, Receiver.

Comes the plaintiff, by Ratcliffe & Fletcher, Esqrs., its attorneys, and comes the defendants, by S. R. Cockrill and John McClure, Esqrs., their attorneys, and comes the jury, to-wit: C. T. Young, F. M. Adams, J. M. Palmer, H. C. Philips, A. D. Billings, L. C. O'Barr, Henry H. McCray, Elisha Ives, W. P. Hunter, E. S. Ellis, G. W. Wagnon, and William Williams, and the trial hereof not being concluded on yesterday, the same is now resumed and the jury having heard all the evidence and argument of counsel and having been charged and instructed by the court, retired to consult of their verdict.”

“And on May 28, 1896.

United States National Bank of the City of New York,

v.

First National Bank of Little Rock, and S. R. Cockrill, Receiver.

Comes the plaintiff, by Ratcliffe & Fletcher, Esqrs., its attorneys, and comes the defendants, by S. R. Cockrill and John McClure, Esqrs., their attorneys, and comes the jury, to-wit: C. T. Young, F. M. Adams, J. M. Palmer, H. C. Philips, A. D. Billings, L. C. O'Barr, Henry H. McCray, Elisha Ives, W. P. Hunter, E. S. Ellis, G. W. Wagnon, and William Williams, and return into court the following verdict: We, the jury, find the issues for the defendant. W. P. Hunter, Foreman.

It is therefore considered, ordered and adjudged that said plaintiff take nothing by its said writ, but be in mercy for its

false complaint, and that the defendants have and recover of and from the said plaintiff all their costs herein expended and have execution therefor."

The cases relied on by plaintiff in error to sustain the jurisdiction of this court are:

1. Where a corporation formed under the act of Congress, or an officer, or receiver, acting under authority of the United States statutes, or United States courts, had in the exercise of the powers and duties granted thereby incurred the liability for which the suit was brought, as in the *Pacific Renewal Cases*, 115 U. S., 1; *Bock v. Perkins*, 138 U. S., 628, and *McNutta v. Lochridge*, 141 U. S., 327.

2. Where a suit was brought against the receiver for the property held by him, or for preference, as in *Hot Springs District v. First National Bank*, 61 Fed. Rep., 417.

The case at bar is clearly distinguishable from either class of these cases. The liability on which this action was brought was in no way incurred by the receiver, but was occasioned solely by the First National Bank. No preference is sought. The action might have been maintained against the First National Bank alone, and a judgment against the bank would have been binding on the receiver.

*Denton v. Baker*, 79 Fed. Rep., 189, 194.

The suit is simply for the purpose of establishing the validity of the claim against the First National Bank, and had the receiver not been made a party he would no doubt have intervened and defended for the bank. To avoid the delay on this account he was made a party in the first instance. There is nothing in

that which raises a Federal question. As said by this court in *Bank of Bethel v. Pahquioque Bank*, 14 Wall., 402: "Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, *as a means of establishing their validity, and to determine the amount owed by the association.*"

The receiver is simply a *party*—proper but not necessary party. He is not the *cause* of the action.

Had he not been sued in the first instance with the bank, and had he intervened afterwards there would have been no jurisdiction.

*Wichita National Bank v. Smith*, 72 Fed. Rep., 568.

The mere fact that he was sued with the bank can give him no greater rights than the bank. He simply defended for the bank, and at last was a mere substitute for it.

The fact that he was made a party raised no other question than could have been raised if the bank alone had been sued.

Respectfully submitted,

W. C. RATCLIFFE,

JOHN FLETCHER,

*For Defendant in Error.*

Office Supreme Court U. S.  
FILED.  
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N<sup>o</sup>. 206.

Brief of Fletcher for D. C.

Filed Dec. 14, 1898.  
IN THE

# Supreme Court of the United States

H. F. AUTEN, as Receiver of the First National Bank  
of Little Rock, Ark. .... Plaintiff in Error,

v.                      No. 206.

UNITED STATES NATIONAL BANK, of New  
York. .... Defendant in Error.

Brief for Defendant in Error.

JOHN FLETCHER,  
*Attorney for Defendant in Error.*  
W. C. RATOLIFFE,  
*Of Counsel.*



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of Little Rock, Ark.....Plaintiff in Error,

v.

**No. 206.**

UNITED STATES NATIONAL BANK, of New  
York.....Defendant in Error.

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## Brief for Defendant in Error.

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This action was brought by the United States National Bank of New York, against the First National Bank of Little Rock and Sterling R. Cockrill, its receiver, to enforce the liability of said First National Bank of Little Rock as an indorser of five promissory notes. For convenience, the two banks above mentioned will be referred to hereafter as the "New York Bank" and the "Little Rock Bank." Three of the said notes were in the following form:

"\$5,000. Little Rock, Ark., December 7, 1892.

"Four months after date we or either of us promise to pay to the order of G. R. Brown and H. G. Allis \$5,000 for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent per annum until paid.

CITY ELECTRIC STREET RAILWAY CO.,

H. G. Bradford, *President.*"

The three notes aforesaid, when received for rediscount by the New York Bank, bore the following indorsements:

“G. R. Brown.

“H. G. Allis.

“First National Bank, Little Rock, Ark.

“H. G. Allis, President.”

Two of the said five notes were in the following form, except that one was made payable five months after date instead of four months after date:

“\$5,000. Little Rock, Ark., December 7, 1892.

“Four months after date we or either of us promise to pay to the order of James Joyce \$5,000 for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent per annum until paid.

McCARTHY & JOYCE CO.,

Geo. Mandlebaum, *Sec. & Treas.*

The notes last aforesaid when received for rediscount by the New York Bank, were indorsed as follows:

“James Joyce.

“H. G. Allis.

“First National Bank, Little Rock, Ark.

“H. G. Allis, President.”

Business relations between the New York Bank and the Little Rock Bank were inaugurated in pursuance of the proposition contained in the following letter, written by the second assistant cashier of the New York Bank to the cashier of the Little Rock Bank, to-wit (Tr., p. 16):

“New York, June 21, 1892.

“W. C. Denney, *Esq., Cashier, Little Rock, Ark.:*

“Dear Sir—Can we not do business with your good bank? We should like to enroll your name upon our books, and we think the relation, if once established, could be made satisfactory to you in every particular, at any rate it would be our



earnest endeavor to make it so. We will give you 2 per cent on your daily balances, granting you our best collection facilities, taking all your foreign items east of the Mississippi River and crediting them to your account immediately without charge. If you will send on \$50,000 of your good, short time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent. We are anxious to do business with your bank, having warmly and favorably known of it, and should be pleased to hear from you in reference to the above proposition.

Yours very truly,

J. W. HARRISON,  
*Second Assistant Cashier.*

The Little Rock Bank, through H. G. Allis, its president, acknowledged the receipt of this communication by letter dated June 24, 1892, accepted the offer and transmitted to the New York Bank notes amounting to \$50,728 for rediscount, which were accepted by the New York Bank. The proceeds were placed to the credit of the Little Rock Bank and it was at once notified of the fact by telegram and also by letter which contained a list of the notes, amount of discount, etc. On July 6, 1892, the New York Bank telegraphed the Little Rock Bank offering to take \$50,000 more of its "short time, well-rated bills, discounted at 5 per cent." This offer was on the same day accepted by the Little Rock Bank by telegram, and on July 9 H. G. Allis, as president of the bank, forwarded by letter notes amounting to \$50,301.88, which were rediscounted by the New York Bank, and the Little Rock Bank was duly notified thereof. On July 26 the New York Bank again telegraphed the Little Rock Bank saying: "Can take \$50,000 more of your well-rated bills, discounted at 5 per cent." On July 29, Allis, as president, wrote the New York Bank accepting this offer and inclosing notes amounting to

\$51,124.93, which were rediscounted by the New York Bank, and of which the Little Rock Bank was duly notified. On October 31, 1892, W. C. Denney, as cashier of the Little Rock Bank, forwarded to the New York Bank by letter notes amounting to \$24,413.05, to be discounted for the purpose of renewing notes maturing in November; these notes were rediscounted by the New York Bank, of which due notice was given the Little Rock Bank by telegram and by letter (Tr., pp. 16-25). In all this correspondence a list of the notes forwarded by the Little Rock Bank was contained in the letter transmitting them, and the New York Bank likewise described each note rediscounted by it in each letter notifying the Little Rock Bank of the same, and frequently returned notes for the purpose of correction.

On November 25, 1892, W. C. Denney, cashier, wrote to the New York Bank the following letter:

The First National Bank, }  
of Little Rock, Ark., }  
November 25, 1892. }

*"United States National Bank, New York City:*

"Gentlemen—Kindly advise us if you can give us \$25,000 more in discounts. We have not decided whether we will make more discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

"We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

"If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

Yours very truly,

W. C. DENNEY,  
*Cashier."*

To which the New York Bank replied as follows:

"New York, November 28, 1892.

*"Mr. W. C. Denney, Cashier, Little Rock, Ark.:*

"Dear Sir—Yours of the 25th is to hand. We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6 per cent.

Yours very truly,

H. C. HOPKINS,

*Cashier."*

On December 13, 1892, H. G. Allis, as president, wrote the following letter:

"Little Rock, Ark., December 13, 1892.

*"United States National Bank, New York City:*

"Gentlemen—In accordance with our letter of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying \$175,000 in demand loans on cotton, which we may have to carry two or three months longer.

"We inclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige.

H. G. ALLIS,

*President."*

Dickinson Hardware Company, due March 3 . . . . .	\$2,500.00
Dickinson Hardware Company, due April 6 . . . . .	5,000.00
City Electric Street Railway Co., due April 10 . . . . .	5,000.00
City Electric Street Railway Co., due April 10 . . . . .	5,000.00
City Electric Street Railway Co., due April 10 . . . . .	5,000.00
McCarthy & Joyce Company, due May 10 . . . . .	5,000.00
McCarthy & Joyce Company, due April 10 . . . . .	5,000.00

"We hold collaterals recited subject to your order and for your account."

To which the New York Bank replied as follows:

[Registered.]

"New York, December 16, 1892.

"*H. G. Allis, Esq., President, Little Rock, Ark.:*

"Dear Sir—We have this day discounted the following notes contained in your favor of the 13th inst., and proceeds of same are placed to your credit:

	Dis't
Dickinson Hdw. Co., due March 3, '93. . \$2,500.00	\$ 32.08
Dickinson Hdw. Co., due April 6, '93. . . 5,000.00	92.50
City Elec. St. Ry. Co., due April 10, '93. 5,000.00	95.83
City Elec. St. Ry. Co., due April 10, '93. 5,000.00	95.83
City Elec. St. Ry. Co., due April 10, '93. 5,000.00	95.83
McCarthy & Joyce Co., due April 10, '93, 5,000.00	95.83
McCarthy & Joyce Co., due May 10, '93. 5,000.00	120.83
<hr/>	
Amount of notes. . . . .	\$32,500.00
Less discount at 6 per cent. . . . .	628.73
Proceeds . . . . .	\$31,871.27

"We inclose herewith note of Dickinson Hardware Company, \$5,000, due April 6, for insertion of amount in body and return to us.

Yours truly,

JNO. J. McAULIFFE,  
*Assistant Cashier."*

And also sent the following telegram:

"New York, December 17, 1892.

"*First National Bank, Little Rock, Ark.:*

"Letter thirteen received; notes discounted; proceeds credited account.

UNITED STATES NATIONAL BANK."

On December 20, W. C. Denney, as cashier, wrote the New York Bank as follows:

"The First National Bank, }  
of Little Rock, Ark., }  
December 20, 1892. }

*"United States National Bank, New York City:*

"Gentlemen—We have your favor of the 16th inst., inclosing the Dickinson Hardware Company note for completion, which we herewith return.

"We charge your account with \$31,871.27, proceeds of \$32,500 of discounts.

Yours very truly,

W. C. DENNEY,

*Cashier."*

To which the New York Bank replied as follows:

"New York, December 23, 1892.

*"Mr. W. C. Denney, Cashier, Little Rock, Ark.:*

"Dear Sir—Your favor of the 20th inst., inclosing note of the Dickinson Hardware Company filled in, as requested in ours of the 16th, duly received.

Yours very truly,

JNO. J. McAULIFFE,

*Assistant Cashier."*

(Tr., pp. 25-27.)

The three notes of the City Electric Street Railway Company, and the two McCarthy & Joyce Company notes, each for \$5,000, mentioned in the letters quoted, are the notes now in suit.

On December 21, 1892, Allis, as president, telegraphed the New York Bank, asking that bank to discount \$30,000 more paper, which the New York Bank agreed to by telegram of same date, addressed to Allis as president. In answering to this, Denney, as cashier, on the same day wrote the New York Bank inclosing notes amounting to \$30,000, which were discounted by the New York Bank, and of which the Little Rock Bank was duly notified, as usual (Tr., pp. 28, 29).

These were all the rediscounts made by the two banks. But from the beginning of business between the two banks, they had the usual business transactions with each other, incident to such relations; the Little Rock Bank sending the New York Bank remittances for its credit almost daily, and continually checking on the New York Bank, until the Little Rock Bank failed February 1, 1893 (Tr., pp. 12, 29, 44).

At the trial plaintiff, in addition to the foregoing facts, showed that it acquired the notes in the due course of business and without notice of any fraud or want of power on the part of the officers of the Little Rock Bank. That the proceeds of the notes were credited to that bank, and paid out in checks regularly drawn by the officers of said bank (Tr., pp. 10, 16).

The defendant showed that the notes never belonged to the First National Bank; that the three notes of the Electric Street Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the company to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted; that neither of the notes was ever passed upon by the discount board of the bank or appeared on the books of the bank; that after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes (\$25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of \$10,679.44; that Allis was at that time indebted to the Little Rock Bank on individual notes for at least \$50,000, and was continuously thereafter indebted to the bank until its failure (Tr., p. 64).

The case has been three times tried before the circuit court at Little Rock, and before the Court of Appeals for the Eighth Circuit. In the first the trial court directed a verdict for the defendant, on the ground that the individual indorsement of Allis preceding that of the Little Rock Bank was sufficient to put the New York Bank upon notice that Allis was acting without authority. This was reversed by the court of appeals (64 Fed. Rep., 985).

At the second trial the trial court again directed a verdict for the defendant, on the ground that rediscounting is equivalent to borrowing money within the meaning of the opinion in *Western National Bank v. Armstrong*, 152 U. S., 346. This was again reversed by the court of appeals (79 Fed. Rep., 296).

At the third trial the trial court, in accordance with the last opinion of the court of appeals, directed a verdict for plaintiff. This was affirmed by the court of appeals, and the receiver has brought error to this court.

The jurisdiction of this court to entertain the writ of error is called in question by motion to dismiss, which has heretofore been argued and is now under advisement by this court.

## ARGUMENT.

### I.

**The case of the Western National Bank v. Armstrong, 152 U. S. 336, is not applicable to the case at bar.**

Counsel for plaintiff in error, at the threshold of this case, takes the position that rediscounting is borrowing of money within the meaning of the opinion of this court in *Western National Bank v. Armstrong*, 152 U. S., 346, and that this is controlled by that case. We submit that that case is not applicable here, because:

(a). The cases differ radically in their facts.

(b). The *dicta* in that case, on which counsel bases his argument, rest upon a mistaken assumption of fact.

Differences in facts:

(1). There the two banks were strangers. Here they had long been correspondents, the Little Rock Bank keeping a deposit account with the New York Bank with a regularly established course of business.

(2). There the transaction was a borrowing of money, pure and simple, and Harper, in requesting the loan, did not ask it on behalf of his bank. Here the transaction was a rediscount of paper purporting to belong to the Little Rock Bank. The request for the rediscount was expressly made on behalf of that bank by W. C. Denney, its cashier, and the transaction consummated by H. G. Allis, its president, with the knowledge and approval of Denney, the cashier.



(3). There no obligation of the Fidelity Bank was transmitted with the request, but only notes signed by A. P. Gahr, and certificates of stock in the Fidelity Bank, both indorsed by Harper individually, the transaction bearing the form of an individual matter. Here notes bearing the indorsement of the Little Rock Bank were sent by Allis, as president, in accordance with a previous arrangement with that Bank, for its credit.

(4). There the record contained no evidence as to the custom or usage of banks in borrowing money or rediscounting paper, nor as to the scope of the powers usually exercised in such transactions by the officers of banks. Here the record shows that it was usual for banks to rediscount their paper and that this was usually done by the president and cashier, and that the transaction in this case was such as is usual for the president and cashier to carry on (Tr., pp. 12, 13).

(5). There the record was silent as to the powers exercised by Harper other than that he was vice president and managing officer, i. e., the general manager of the business of the bank. Here the record shows that Allis was permitted to manage the affairs of the bank very much as he saw fit; that the question of rediscounting paper was never presented to the board of directors, but that Allis directed when and where rediscounts were to be made, and that he and the cashier, acting under his orders, <sup>attended</sup> ~~alluded~~ to the same without regard to the board; that Allis had in all the previous transactions of like nature with the New York Bank except one (Tr., p. 24), transmitted the notes for rediscount; that the notes in question were rediscounted not only in accordance with a previous request

of the Little Rock Bank made by its cashier, but were transmitted by Allis in accordance with the previously established and usual course of business between the two banks.

(6). There all the letters from Cincinnati were signed by Harper individually; the letters from New York were addressed to Harper as vice president. Here all the correspondence from Little Rock in reference to this and previous transactions was on behalf of the bank and signed either by Allis, as president, or by Denney, as cashier, and of those relating specifically to the paper in controversy, Denney, as cashier, wrote the first requesting the rediscount, Allis, as president, wrote the next in "*accordance with*" the letter written by Denney and the letter of the New York Bank in reply thereto, and Denney, as cashier, wrote the last confirming the rediscounts of the notes sent in the letter written by Allis.

(7). There the loan made by the New York Bank was drawn out by false drafts not appearing on the books of the Fidelity Bank. Here the proceeds of the rediscounts were drawn out by regular drafts appearing upon the books of the Little Rock Bank, in the regular course of business and for the purposes of that bank.

(8). There the amount borrowed was \$200,000, as the court said "enormous." Here the amount was small, but little more than half the amount of previous rediscounts.

There are other differences between the two cases which will be referred to in the further argument of the case.

That case has not met with the approval either of the bench or the bar, and the courts where it has been relied on

have confined its application strictly within the facts, as disclosed by the opinion in the case.

Davenport v. Stone (Mich.), 62 N. W., 722.

Diltry v. Dominion Nat. Bank of Bristol, Va., 75 Fed., 769.

Chemical Nat. Bank v. Armstrong, 76 Fed., 339.

Armstrong v. Chemical Nat. Bank, 83 Fed., 556.

We have been favored with the very able and exhaustive brief of Judge William Worthington, of the Cincinnati bar, who represented the Chemical National Bank in *Armstrong v. Chemical National Bank*, 83 Fed., 556, in which he reviews the *Western National Bank* case, and while the case argued by Judge Worthington was one of borrowing money, that part of his brief in reviewing the *Western National Bank* case is so applicable here, we take the liberty to copy it as a part of our brief in this case. He said:

*"Dicta rest on mistaken assumption.*—The following quotations from *Western National Bank v. Armstrong*, 152 U. S., 346, 350, give fairly, I think, the essential parts of that opinion bearing upon the power to borrow money:

"There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time.' \* \* \* 'The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months' time.

"It might even be questioned whether such a transaction would be within the power of the board of directors.'

"The court then quotes from the eighth section of the National Banking Act (Rev. Stat., sec. 5136, par. 7), and continues:

“The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted.’

“Then, after quoting from *First National Bank v. National Exchange Bank*, 92 U. S., 122, 127, a passage showing that by necessary implication a bank has power to incur liabilities in the regular course of its business, the court continues:

“Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

“Even, therefore, if it be conceded that it was within the power of the board of directors of the *Fidelity National Bank* to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally as obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.’

“The conclusion thus reached by the court rests, it will be seen, entirely upon the premise stated by it, that: ‘The business of the bank is to lend, not to borrow, money; to discount notes of others, not to get its own notes discounted.’ Upon this foundation is built the superstructure, first, that the temporary borrowing of money is ‘out of the course of ordinary and legitimate banking;’ and, secondly, that special authority is essential to validate such a loan. If the major premise, the foundation of the argument, be unsound, the whole structure falls.

“I yield to no one in respect and reverence for the Supreme Court of the United States. And far be it from me to urge upon a tribunal inferior in the judicial hierarchy to disregard a decision of that court upon a matter of law. But when it comes to questions of fact, the situation is altered. Even Homer nods; and while the Pope of Rome claims infallibility, this is only when speaking *ex cathedra* on matters of faith. To follow out the simile just suggested, the Supreme Court of the United States, when giving judgment in law upon a matter presented by the record, is, so far as inferior courts are concerned, infallible in its declarations of law. But this

does not cover its expressions of opinion upon matters of law not presented by the record, and still less its statements as to matters of fact. Such statements are conclusive only as to the particular case in which they were made. However positively asserted, they are never more than persuasive in other cases; they cannot be conclusive upon another tribunal in such manner as to prevent it from seeing a manifest error disclosed by further illumination of the subject.

"Not to multiply illustrations of a proposition so self-evident, I call attention to but two, and those noteworthy instances taken from the decisions of the supreme court itself.

"During the first fifty years of this government, it was assumed that the ebb and flow of tide was essential to the existence of admiralty waters. This rested, in its essence, upon a question of historical fact, namely, what was the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted. In course of time, the supreme court, though it had early and repeatedly limited admiralty jurisdiction to tide waters, was driven to re-examine the question from an historical point of view, and upon such re-examination to conclude that all waters were admiralty waters which served for more than merely local commerce. The *Genessee Chief*, 12 How., 443; *The Moses Taylor*, 4 Wall., 411; *The Hine v. Trevor*, Ibid, 555; *Ex parte Garnett*, 141 U. S., 1.

"For over a hundred years it had been supposed, and had been stated in numerous decisions, that taxes upon income were, when the constitution was adopted, considered as indirect taxes. But when the whole subject was re-examined in the debate over the income tax enacted by the act of August 15, 1894 (28 Stats. at Large, 509), with a thoroughness of research that had never before been given, it became manifest that this assumption of fact was erroneous, and that when the constitution was adopted, income taxes were recognized to be, as logically and in truth they could not but be, direct taxes and not indirect.

"*Pollock v. Farmers Loan and Trust Company*, 158 U. S., 601.

"What is embraced in the business of banking is a question of fact, not of law. Its solution depends upon the usage of bankers, what they are habitually or commonly accustomed to do. This is different from the question as to what may be

the powers of any particular bank. The latter will depend upon whether the bank be created by statute, or by private agreement between individuals, or be the property of but one person, and will involve questions of law as to the interpretation of such statute or agreement. But *the banking business* means the business transacted by banks generally, no matter how created; and what that business is, depends simply and solely upon what banks are accustomed to do. Whether any particular bank can do everything germane to the banking business depends upon the charter or other constating instrument creating that bank.

"It will be observed that the supreme court in the Western National Bank case does not find any limitation upon the borrowing power imposed in terms or by implication by the National Banking Act. It rests its conclusion solely upon the ground that borrowing is not incident to the banking business, or, to use the words of the court, is 'out of the course of ordinary and legitimate banking.' This is simply and purely a question of fact. Its existence is not affected nor conclusively disproved by a statement in the opinion of any court, no matter how weighty or deserving of respect the pronouncements of that court may be. One seeking to learn what is, in truth, within the course of ordinary and legitimate banking, will not rest with the assertion of any one man or any one tribunal, but will test that assertion by examining the nature of the business and the manner in which it is actually done; what history tells us as to how it has been done in the past; and what judicial opinions show us has been heretofore considered incidental or usual in that business.

"To the sources of information just suggested I shall now turn, and with their aid I expect to show that the supreme court was mistaken in matter of fact, when it said that the business of a bank is to lend and not to borrow money, and that borrowing money is out of the course of ordinary and legitimate banking. And if I shall succeed in impressing this truth upon the court, then I submit that no rule exists which compels the court to shut its eyes to the truth, and to adhere to a mistake of fact made by another, and blindly follow the lead thus set as if such mistake did not exist."

“AUTHORIZATION PRESUMED.

II.

**Temporary borrowing is within the course of ordinary and legitimate banking.**

“As a rule, wherever money is to be used in a business, there the borrowing of money is incidental to that business. Because of this the doctrine is well settled that all commercial corporations have an implied power to borrow money. For their business cannot be transacted without money, and all means of securing it must necessarily be considered as given. Hence, in *Morawetz on Corporations*, sec. 342, it is said:

“Corporations have implied authority to borrow money and incur debts for the purpose of accomplishing their legitimate purposes, unless the contrary be expressly provided. \* \* \* Some kinds of corporations, like banks, must borrow money daily, in carrying on their ordinary affairs; in other cases, the business of a corporation may not require it to borrow except under extraordinary circumstances. But it may be stated as a general rule, that every corporation has implied authority to borrow money whenever the borrowing of money is a reasonable method of carrying out the purposes for which the company was chartered.’

“And in 4 *Thompson on Corporations*, sec. 5697, it is said:

“It is believed to be in conformity with all judicial holdings to say that every corporation, except those organized for public or governmental purposes, which may require the use of money for carrying out the purposes of its organization, has an implied or incidental power to borrow money for such purposes, although no such power is expressly granted in its charter, and to give the customary evidences of debt therefor, and to add to this the customary security.’

“The doctrine thus asserted by the text writers has been affirmed by the Supreme Court of the United States, in *Railroad Company v. Howard*, 7 Wallace, 392, 412, in the following words:

“Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legiti-



mate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.'

"When the nature of the banking business is considered, it would be strange indeed if this doctrine did not apply to it in full force and vigor; for what is that business? It is indicated by the terms of characteristic usually attached to the word 'bank;' that is to say, banks are spoken of as banks of issue, deposit, exchange, or discount. Some one of these features an organization must have, to be a bank at all; usually, at the present time at least, all of them, except the function of issue, are exercised by all banks.

"Let us analyze these terms and see what they connote.

"A bank of issue is one that sends out its promissory notes payable on demand, for value given to it in money or credit; in other words, it is a borrower of money payable on demand.

"A bank of deposit is one which receives the money of others as a loan; if the deposit be general, it agrees to repay the money in sums as and when demanded; if the deposit be special, it agrees to return the money as a whole when demanded. It will be observed that I have not used the phrase 'special deposit' as signifying the bailment ordinarily meant by that term where the particular thing deposited is to be returned, but as signifying that kind of a deposit which is represented ordinarily in banking by a certificate of deposit. Deposits in the banking business are never special in the sense in which that word is used in the law of bailments; for the title to the money deposited passes to the bank, and it becomes the debtor of the depositor. Deposits, whether general or special, may or may not bear interest, according to the custom of the particular bank. Here also, the bank is a borrower of money.

"A bank of exchange is one which apparently sells credits upon other places. It really, however, borrows from the person, to whom it issues its exchange, money payable through its correspondent upon the presentation of the exchange. Its profit in the transaction arises not merely in the premium it may charge for the exchange, but in having the use of the money without charge from the issue of the exchange until its presentation. So here again the bank is a borrower of money. Of course this transaction has ordinarily its reciprocal side,



for a bank of exchange buys, as well as sells, exchange; that is to say, it pays money out for a credit to be paid at some other place, as well as receives money in for giving such credit.

"A bank of discount purchases credits in the form of written obligations, giving in return money, or money's worth, in the shape of counter credit.

"Thus we see that in every branch of the banking business, except the buying of exchange and the discounting of notes, borrowing money is the essential feature. While banks have been known which confined themselves to being banks of discount, yet there have been but few of them; and such an organization would not readily present itself to the mind as suggested by the word 'bank.' That word ordinarily calls up the idea of a bank carrying on the three principal operations in which all banks of modern times engage, *i. e.*, deposit, discount, and exchange. Most essentially is this true with reference to incorporated banks; for such a creation limited to discounting only would be foredoomed to failure. If a bank had for its resources for discount only the capital its owners put into the business, the expenses of maintaining the bank would so eat into the profits that failure, in the sense of nonsuccess, would be certain. It is not by virtue of their own capital, but by using the capital lent to them by others, in other words, by their deposit accounts, that banks are able to make money in discounting paper. Hence it is not true to say: "The business of the bank is to lend, not to borrow, money." On the contrary, the statement should be: "The business of the bank is to borrow, that it may lend, money."

"The profits in banking, as stated, are from lending money. To enable banks to lend money with profit, they must borrow. At some times and in some places the money borrowed by the banks from their depositors can all be lent again to their customers. But this is not always the case. At times more money is deposited, that is to say, lent to the bank, than it can lend again to those doing business with it; in such case, the money borrowed by it must lie idle or seek some other than the usual channel of use. At other times, the money deposited is not sufficient to meet the legitimate demand upon the bank for loans; in such cases, it must hire money elsewhere, or else forego a legitimate profit within its reach. The situations just depicted are not extraordinary, but normal, in certain places; that is to say, agri-

cultural communities have ordinarily a glut of money deposited in the banks, while manufacturing communities have ordinarily an excessive demand for loans from the banks—excessive in the sense that the demand for loans in a community exceeds the money deposited by that community. Again, in agricultural communities in this country, as is well known, there is a certain season when the amount of money there circulating is insufficient to transact the business; at that season, known as the time for ‘moving crops,’ the banks in agricultural communities must seek other funds than those lent to them by their own depositors. Hence it comes about that banks in the regular, ordinary, legitimate course of their business have occasion to borrow, and do borrow, money from other banks. At one point the demand for money is slight; at another it is great. The bank at the latter borrows from the bank at the former, and the equilibrium is restored. This borrowing may be by giving what is primarily the obligation of the borrowing bank, or by rediscounting notes it has already discounted. In either case, the result is the same. Money is borrowed which the borrowing bank obligates itself to repay.

“To say, therefore, that borrowing money is not a legitimate part of the banking business, is utterly to misconceive the nature of that business. The very breath of a bank’s life depends upon its power to borrow money. That power failing, either from legal disability or from financial distrust, the bank is doomed. Able to borrow, it is able to lend again and to make money. How it borrows and whence it borrows are not material; it matters not whether it borrow on deposit credited to the lender upon its books, or on its note or indorsement which the lender takes with him, or on its assurance, written or verbal, that the money will be repaid; all come to the same end. The essence is, the bank must borrow that it may lend again.

“*Present Usage.*—Thus far I have considered the subject from our common knowledge as to the nature of the banking business. I shall turn now briefly to the evidence appearing in this record.

(Here reference is made to the evidence in the case.)

“This evidence—and more like it is contained in the record—is, as before stated, utterly without contradiction. And it is confirmed by information to be gathered from the reports of the Comptroller of the Currency to Congress,

which, though they are not embodied in the record, will receive judicial notice because they are reports of a principal executive officer made to Congress pursuant to law (Rev. Stats. of U. S., sec. 333; *Heath v. Wallace*, 138 U. S., 573, 584). On page 115 of volume 1 of the Comptroller's report, made December 4, 1893, is given a consolidated statement of the conditions of national banks on October 3, 1893, from which it appears that the notes and bills discounted in reserve cities other than New York, Chicago, and St. Louis, as shown by the returns to the Comptroller, amounted on that day to \$3,137,972, and the bills payable to \$10,556,104; and that in the national banks not in reserve cities the notes and bills rediscounted then amounted to \$17,928,765, and the bills payable to \$16,628,834. On pages 254-275 of the same report will be found consolidated statements of the national bank returns to the Comptroller of the Currency for every year from 1863 to 1893, inclusive. Prior to 1869 notes and bills rediscounted, and bills payable, were not separately itemized, but in that year this separation began; and it will be seen that thereafter the amount of each item was never less than one million, and was generally several millions. During the years 1886 and 1887, which I choose because nearest to the transaction in question, the amount of notes rediscounted range from \$7,556,837.10 to \$17,312,806.39; and the bills payable from \$1,145,240.26 to \$5,105,112.57. The amount of these loans greatly increased, with some fluctuations, until in July, 1893, it came to more than sixty millions of dollars, which was in round numbers 10 per cent of the entire capital stock, 40 per cent of the entire circulation, 4 per cent of the entire individual deposits, and 3 per cent of the entire loans and discounts, of all the national banks then reporting. This statement alone seems sufficient to show that borrowing money otherwise than by circulation or deposit is a normal and usual feature of the banking business. It is a standing resource of which banks avail themselves, as a matter of course, where profit offers, or occasion justifies their so doing; of course it is not used to as great a proportion as either circulation or deposits, because its cost in the way of interest is greater.

*"Banking Literature.*—Probably the book of greatest value as to the practical side of the banking business is one originally entitled, 'A Practical Treatise on Banking,' but in more recent editions called 'The History, Principles, and Practice of Banking.' Its author is J. W. Gilbart, F. R. S., who was for many years director and general manager of the Lon-

don and Westminster Bank, one of the earliest and most important of the joint stock banks of London. It was originally published in 1829; but it has gone through many editions. This circumstance alone is testimony of the greatest weight as to its value. The edition from which I quote is that of 1882, revised by A. S. Michie, deputy manager of the Royal Bank of Scotland; it, as well as the other books of that class to which I shall refer, can be found in the Cincinnati Public Library. From it I quote as follows:

“Volume 1, page 13: ‘The exchanging of money; the lending of money; the borrowing of money; the transmitting of money, are the four principal branches of the business of modern banking, and in most countries they seem to have taken their rise in the order in which they are here named.’

“Volume 1, page 23: ‘That part of the business of banking which consists in the borrowing of money, with a view of lending it again at a higher rate of interest, does not appear to have been carried on by bankers until the year 1645, when a new era occurred in the history of banking. The goldsmiths who were previously only money-changers, now became also money-lenders. They became also money-borrowers, and allowed interest on the sums they borrowed.’

“Volume 1, pages 127, 128: ‘Banking is a kind of trade carried on for the purpose of getting money. The trade of a banker differs from other trades, inasmuch as it is carried on chiefly with the money of other people.

“‘The trading capital of a bank may be divided into two parts: the invested capital and the banking capital. The invested capital is the money paid down by the partners for the purpose of carrying on the business. This may be called the real capital. The banking capital is that portion of capital which is created by the bank itself in the course of its business, and may be called the borrowed capital. \* \* \*

“‘The profits of a banker are generally in proportion to the amount of his banking or borrowed capital. If a banker employ only his real or invested capital, it is impossible he should ever, in the ordinary course of business, make any profits. Bankers can seldom attain more upon their advances than the market rate of interest; and that may be obtained upon real capital, without the expense of maintaining a banking establishment. If, after deducting the expenses, the

profits amount to nothing more than the market rate of interest upon the invested capital, the bank may be considered to have made no profits at all. The partners have received no higher dividend upon the capital invested in the bank than they would have received if the same money had been laid out in government securities. To ascertain the real profit of a bank, the interest upon the invested capital should be deducted from the gross profit, and what remains is the banking profit.'

"Volume 1, page 190, speaking of the advantages of bills receivable over cash credits: 'If we discount bills of exchange, they can be rediscounted to supply the bank with funds, if necessary, but advances on cash credits cannot be replaced.'

"Volume 1, page 248: 'The rediscounting of bills of exchange is an operation of much importance, and has a great influence on the monetary operations of the country. We quote from a former work of our own, *i. e.*, "The History of Banking in America," upon this subject: "Banks situated in agricultural districts have usually more money than they can employ. Independently of the paid-up capital of the bank, the sums raised by circulation and deposits are usually more than the amount of their loans and discounts. Banks, on the other hand, that are situated in manufacturing districts, can usually employ more money than they can raise. Hence, the bank that has a superabundance of money, sends it to London, to be employed by the bill brokers, usually receiving, in return, bills of exchange. The bank that wants money sends its bills of exchange to London, to be rediscounted. These banks thus supply each other's wants, through the medium of the London bill brokers."'

"(It will be remembered that the bill broker in London is an intermediary between the borrower and the lender. In the cases referred to by the author, he is the chain of connection between the borrowing and the lending banks.)

"Volume 1, page 320, speaking of the conduct of the banker in times of pressure: 'If a banker has money lying at demand with a bill broker, he will now have occasion to call it in. If he has money lent at short periods at the Stock Exchange, he will, as he has occasion, take in the money as the loans fall due. If he has discounted broker's bills, he will receive the amounts when due, and discount no more. Should

these operations not be sufficient to meet the demands upon his funds, he will then sell his stock or exchequer bills, or borrow on them in the money market. A country banker who has kept his reserve in bills of exchange will be anxious to rediscount them, and will think himself lucky if he can do so readily and at a moderate rate of interest.'

"Volume 2, page 209, treating on the differences between the branch bank system of Scotland and the country bank system of England: 'The system of numerous branches enables the banks of Scotland to transfer the surplus capital of the agricultural districts to the manufacturing and commercial districts, without going through the process of rediscounting their bills.

" 'Some Scotch writers have considered it a reproach to the English banks that they rediscount their bills, and have boasted that the practice of rediscount is unknown in Scotland. The accusation is made without due consideration. The system of branches makes a difference in all banking arrangements. A bank in an agricultural district, say at Norwich, has a superabundance of money. A manufacturing town, say Manchester, has a demand for money. The bank at Norwich will send its money to a bill broker in London. The bank at Manchester will send its bills to the same broker. A rediscount takes place. But let us suppose that the bill brokering establishment should become the head office of a large bank, having one branch at Norwich and another at Manchester. Then no rediscount will occur. The bills discounted at Manchester will never pass out of the possession of the bank. Nevertheless, the surplus funds at Norwich will be transferred to meet the wants of Manchester as effectually as before. This is an illustration of the branch system in Scotland. A bank at Edinburgh will have branches in both the agricultural and the manufacturing districts. Or a bank whose head office is in a manufacturing town, will have branches in the agricultural districts. Thus the surplus funds of Perth, Ayr, and Dumfries are speedily transferred to be employed at Glasgow, Paisley, and Dundee. Were a bank to be established at Glasgow without branches, it would probably have occasion for discount at certain times, as well as the banks at Manchester or Leeds.

" 'At the same time, we think this transfer of capital by means of branches is better than by means of rediscount.

There is no occasion for the intermediate party, the bill broker. The bills do not go out of the bank, so that men's transactions do not become known. The abuses connected with rediscount by fictitious bills are effectually prevented, and the bank can more readily regulate its advances in accordance with its means. To recur to our illustration: The bank at Norwich may lose a large amount of its depositors; the bank at Manchester, knowing nothing of this, may continue its advances in dependence upon receiving its usual rediscount. The check may at length come so suddenly that the Manchester bank may be placed in difficulty. Under the branch system, should any large amount of deposits be withdrawn from one branch, the bank would immediately limit its advances at the others. The advantage of this system on the approach of a pressure is obvious.'

"In 1847, there was published in London a book called 'Capital, Currency, and Banking,' by James Wilson, Esq., M. P., being a republication of a series of articles printed in the 'Economist' in 1845 and 1847. I quote from article 3, page 26:

"'As a general rule, the independent capital of bankers constitutes but a very small portion of the means upon which they trade. As we have before observed, bankers are rather the medium through whom the capital of others is lent and borrowed than dealers in their own capital. The private and independent paid-up capital belonging to banks may be looked upon rather in the light of a guarantee to the public for their security against the risk which it is known bankers must incur in the use of the deposits placed in their hands, than as constituting any very important portion of their means of trading.

"'A banker being essentially, in the first place, a borrower of money, returnable on demand, the great art of his profession is to employ those funds in such a way as will at all times and under ordinary circumstances enable him to meet such demands.'

"Page 32: 'The practice of banks (in London) not allowing interest on deposits has at length changed the character of the bill broker to that of a banker, taking deposits (money at call), at a given rate of interest, from one man to lend it by discounting bills at a higher rate of interest to others. At the same time that he acts as a medium for transferring spare cap-



ital which accumulates with banks in one part of the country to those in other parts, where trade and commerce create a greater demand for it.'

"Also from article 4, page 36: 'The business of a banker is to borrow and lend.'

"G. M. Bell, secretary of the London Chartered Bank of Australia, has published a little book called 'The Philosophy of Joint Stock Banking.' I quote from the second edition, published in 1855, from chapter 10, entitled, 'On Rediscounting.'

"Page 67: 'A bank whose capital is either not commensurate with its business, or which has been imprudently invested, becomes dependent, in a large measure, upon its resources by rediscounting.'

"Page 68: 'The official returns made by joint stock banks, show that numerous establishments in the manufacturing and mining districts possess very inadequate capital. The same fact is revealed by the large quantity of paper, bearing the indorsement of these banks, constantly afloat in the money market.'

"After arguing against the inadvisability of habitually rediscounting, he says, page 69: 'These observations are not intended absolutely to discountenance or throw entire discredit upon the practice of rediscounting. \* \* \* The dangerous length to which it is in many cases carried, forms the chief ground of its condemnation.'

"It is well known that banks in the agricultural districts accumulate capital by deposits and circulation, for which they can find no other employment than by sending it to the London bill brokers, or investing it in the funds. It is equally well known that banks in the mining and manufacturing districts have demands upon them for accommodation out of proportion to their capital, which they cannot otherwise supply than by having recourse to the system of rediscounting with bill brokers. This latter class derive their profits from the difference of interest on the money borrowed and lent between the banks in this way. The borrowing bank, therefore, pays an extra charge, which by a different arrangement might be avoided, and both parties be equally well accommodated. The arrangement here suggested is that one bank should lend direct to another without the intervention of a



broker. The bank that borrows money from its depositors at 2 per cent could very profitably lend to its neighbor at  $2\frac{1}{2}$  or 3 per cent, more or less, in proportion to the ever-changing value of money.'

"In 1885 there was published by John Murray, of London, the second edition of a book called 'The Country Banker, His Clients, Cares, and Work, from an Experience of Forty Years,' by George Rea, author of 'Bullion's Letters to a Bank Manager.' I quote from page 218:

"*'Rediscounting.*—The rediscount, or sale of a portion of its bills, is often an important feature in the financing of an English country bank.'

"The author then proceeds to state some of the objections to this practice, and continues:

"'But the objections which apply to banks having ample resources within themselves do not apply to banks placed in districts of great industrial activity, where deposit money is scarce and the demand for loan capital is great. There is nothing opposed to sound banking principle in banks thus placed supplementing their resources by rediscounting portions of their bills, and thus drawing supplies from the London market. A bank, by this process, merely transfers that portion of its discount business to London which is in excess of its local means to meet it.'

"Mr. Walter Bagehot, in 'Lombard Street' (edition of 1873, published by Scribner, Armstrong & Co., N. Y.), says, page 243:

"'A banker's business—his proper business—does not begin while he is using his own money; it commences when he begins to use the capital of others.'

"On page 285 he quotes from the testimony given by Mr. Richardson in 1810 to the Bullion Committee of Parliament, as to the nature of an agency for country banks: "'It is twofold: in the first place, to procure money for country bankers on bills when they have occasion to borrow on discount, which is not often the case; and in the next place, to lend the money for the country bankers on bills on discount. The sums of money which I lend for country bankers on discount are fifty times more than the sums borrowed for country bankers.'"

“On page 287 Mr. Bagehot says: ‘For the most part agricultural counties do not employ as much money as they save; manufacturing counties, on the other hand, employ much more than they save; and therefore the money of Norfolk or of Somersetshire is deposited with the London bill brokers, who use it to discount the bills of Lancashire and Yorkshire.’

“In the ninth edition of the *Encyclopaedia Britannica*, under the title ‘Banking,’ will be found the following:

“‘Bankers may borrow money on call, at deposit, on debentures, at interest, or without interest, and they may lend on open credits, by discounting bills by advances repayable in installments or otherwise, etc.

“‘Discount banks and discount agencies borrow money on call or deposit, and lend it exclusively in the discount of bills and negotiable securities, which they often rediscount with capitalists desirous of investing their money in forms capable of being speedily realized.’

“Turning now to a work published in this country, I call attention to ‘*The Methods and Machinery of Practical Banking*,’ by Claudius B. Patten, of Boston, Mass., published in 1891. From the preface, it appears that Mr. Patten had been for twenty years, prior to 1867, connected with the Suffolk Bank of Boston, and that in that year he became cashier of the State National Bank of that city, where he continued until his death in 1886. It will be remembered in reading the extracts made from his work, as well as the other quotations above, that there is no substantial difference between the credit here given by the Chemical Bank and hiring deposits by paying interest; the essential features of the two transactions are the same; in each case the borrowing bank makes a call loan on which it agrees to pay interest.

“On page 69, when speaking of returns by banks to governments, he says:

“‘Then another—a return of the condition of the Bank of Moscow (see Form 11)—which I obtained in London, and to which I call attention for the purpose of showing that the drift of the banks of this country toward a habit of paying interest upon deposits is nothing new in banking—that it is everywhere in Europe a common thing with stock banks.

“This practice, which I personally observed in London, extends from London to Moscow.”

“A statement of the Moscow Discount Bank is added, from which it appears that with a capital of 4,000,000 roubles, its time deposits, over one-third of the whole, exceeded 3,000,000, and its bills rediscounted exceeded 1,000,000, its total liabilities being 16,730,287.56 roubles.

“On page 355 he gives this statement as to the clearing house loans which were such a feature in the case of the Merchants Bank v. State Bank, 10 Wallace, 604:

#### “LOANS BETWEEN BANKS AT CLEARING.

“In some of our clearing house cities, notably in Boston, the banks are in the habit of borrowing of each other, as their situation may demand, immediately after they have made their morning settlements. These negotiations are, of necessity, made by the representatives of the banks who are present at the clearing. And these representatives are mainly the messengers and settling clerks of the banks, though it has of late years become the custom with many banks to be present at these morning after-clearing negotiations in the person of their cashier.

“This custom has been in existence for at least twenty years, and the aggregate of loans of this class made there daily is very large, ranging from hundreds of thousands to millions of dollars. I have known many instances where banks, which have emerged from the morning settlements with gains of more than a million, have before leaving the clearing house, scattered these entire gains in loans among losing banks—loans negotiated on both sides by single representatives of the banks, and those often junior clerks. There is nothing of this sort done in the European clearing houses.

“I found the London bankers interested and astonished to hear that we indulged in financial transactions of this character.

“The loans made at clearing are loans of minute money. They are rarely secured by deposit of collateral of any sort.

“The bank receiving the accommodation draws upon the lending bank a check in its usual form. The loan is

charged to it; and, when it is repaid, the lending bank settles the transaction by simply drawing upon the debtor bank for the amount.

“The current rates for these loans are usually about 1 per cent under those charged upon standard call loans to private bankers and merchants. This is because they are loans for large round sums, ranging say from ten thousand to hundreds of thousands of dollars, and because the money thus advanced is understood to be immediately available in the form of clearing house funds.”

“On page 406, he says:

“SHALL NATIONAL BANKS BECOME DEALERS  
IN MONEY?”

“Shall national banks become dealers in money, or shall they simply bank upon the capital furnished them by their shareholders, unhired depositors, and bill-holders? There is no banking question of the period of more vital interest than this, and none which is being more actively discussed.

“There is no doubt but that some of the most successful banks in the United States—banks which have paid the largest kind of dividends, and which to-day show a heavy surplus and a current business of the most profitable character—are those which have been run upon a moderate share capital and large interest-paid deposits. These banks have bought money in all directions, paying comparatively heavy prices for it, and have sold the same at a very slight advance. Yet the magnitude of their transactions has so swollen their profits that their small capitals have reaped the largest remuneration. This is doing business on the London joint stock bank principle—a principle which has in London been worked with marvellous success. The leading London banks in question carry deposits, upon which heavy interest is paid, to the amount of from ten to twenty times their capital. Their dividends have for many years been enormous, and their shares to-day sell, in some instances, at two or three times their par value.

“Banks which deal in money to the extent which I have described and which carry the limited share capital, have need only of making a very small percentage on the money

they handle in order to earn a large dividend for their share capital. The motto of such institutions is large sales and small profits, yet the net results are most satisfactory.

"The risks of banking of this class are large. The management of the enormous loans, which is the critical feature of the business, demands extraordinary vigilance and caution, for a slight sweep in the wrong direction, where such heavy current investments are being made in notes, acceptances, and collateral loans, must at once wreck all prospects of dividends for stockholders.

"It must have been noticed by observing bankers that the drift of banking in the United States has of late been in the direction of an imitation of this English style of doing business. The great success which has marked the management of some of our largest trust companies—which have copied directly the London banking methods—has had much to do with leading the national banks into the habit of paying higher rates of interest upon deposits."

"On page 381, treating of trust companies in this country, the author says:

"These trust companies scatter among the national banks around them (those banks that are willing to pay a liberal interest upon large, round demand deposits) such of their resources as are accumulating on their hands awaiting investment, or funds which they do not deem it prudent to place beyond their immediate reach."

"I quote also from 'Practical Banking,' by Albert S. Bolles, published by the Homans Publishing Company, of New York, in 1884.

"On page 73, in discussing the powers of the cashier, he says:

"As the cashier is the ostensible executive officer of a bank, he is presumed to have, in the absence of positive restrictions, all the power necessary to transact its business. Thus, in the absence of restrictions, if he should procure a *bona fide* rediscount of any paper of the bank, his indorsement would bind it, because he has the implied power to transact such business."

"On page 99, in speaking of the duties of the discount clerk, he says:

“ ‘Sometimes a bank will rediscount a portion of its notes with other banks. It may desire to get possession of more funds, in order to pay the demands of depositors, or through fear of an increased demand. In other words, the loans which it may have made are transferred to another institution.’

“*Judicial Opinions.*—Most of the cases wherein courts have found it necessary to treat of the borrowing powers of banks arose from abuse or misuse of those powers. Sometimes the money was borrowed by an agent whose power to act in the premises was disputed; sometimes the agent embezzled the money which was borrowed so that the bank never got the benefit of it. Cases of the kinds just suggested will be mentioned *infra* under other heads of this argument, and to them I refer without repeating here. But in three cases of great importance the court was confronted with the proposition that a bank had no power to borrow money unless expressly given by its charter. In each of these cases the nature of the banking business, and of the transactions incident to it, were examined; and to them I shall ask attention in some little detail.

“The first of these in time is the case of the Bank of Australasia *v.* Breillat, 6 Moore P. C. C., 152, decided by the Privy Council in December, 1847. The facts, so far as necessary to state them for our present purposes, were as follows: The Bank of Australasia was a partnership doing business at Sydney, in New South Wales. The Bank of Australia was a joint stock company incorporated under a special act, doing business at the same place; the defendant, Breillat, was the chairman of the Bank of Australia, and the nominal defendant, under statutory provisions, in suits brought against it. The deed of settlement, which constituted the charter of the Bank of Australia, put the control of its business in a board of directors, and it declared that business to be the discount and issue of notes and bills, the lending of moneys on securities, and cash accounts for the safe custody of moneys and securities for moneys, for general public accommodation and benefit, and transacting and negotiating all other matters usually connected with the ordinary business of banking; and by clause 54 it declared the board of directors should have entire control of the lending of money on bills, notes, etc., the purchase and sale of bullion, gold, and silver, and such coins and moneys as they might think necessary or advisable, and of calling in all moneys due the company. The Bank of Australia early in 1843, having become involved in difficulties, applied to the

plaintiff for assistance. This was given in the form of a loan of £154,000 sterling upon certain conditions involving, among other things, the winding up of the banking business of the Bank of Australia. In October, 1843, the Bank of Australia gave its demand note for the sum thus lent. In August, 1844, the shareholders in the Bank of Australia declared this note was not binding on that bank, and instructed the directors to defend any action brought to recover on the same. Thereafter this suit was brought upon the note. The committee of the Privy Council who sat in judgment were Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, and T. Pemberton Leigh. The opinion of the committee was delivered by the latter. Having stated the facts and the issue, and described the nature of the powers given to the board of directors, he continues, page 193:

“The effect, we think, is to confer on these directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the deed restricting those powers.

“First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary banks? And, secondly, if so, is there any restriction expressed, or to be inferred, from the deed?”

“Then, having quoted with approval sections 124 and 125 of Story on Agency as to the powers of partners, and having shown that borrowing money for partnership purposes is unquestionably one of those powers, he continues, page 194: ‘Then, is the nature of a banker’s business such as to exclude the power, from want of occasion of its exercise? Quite the contrary. The nature of a banker’s business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may even be impracticable, or the concern must be ruined.



“We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed.’

“The next case is that of *Curtis v. Leavitt*, 15 N. Y., 9, decided in 1857. The case grew out of the failure of the North American Trust and Banking Company, incorporated under the general banking law of New York, passed in April, 1838. This bank, having a paid-up capital of over \$3,000,000, became embarrassed in 1840, and to provide means to meet its obligations, issued its bonds in two series, one for one million dollars, and the other for half a million dollars; each series of bonds was secured by a separate deed of trust conveying specific assets of the company for that purpose. In 1841 the company went into the hands of a receiver, who instituted this suit to declare these bonds and the trust deeds securing them void as being beyond the corporate power of the company, and also as creating a fraudulent preference. The case was argued by some of the ablest counsel who ever practiced in New York, and from the opinions it is evident that it must have been most carefully argued and thoroughly considered. There were five of these opinions, delivered by Judges Comstock, Brown, Shankland, Paige, and Selden. Each of them discusses the nature of the banking business and the powers given by the New York banking act of 1838. As those powers were given in language almost identical with that contained in the National Banking Act (the sections are quoted, pages 46, 47, *infra*), the decision is of peculiar importance, for it gave a judicial construction to the statute upon which the National Banking Act was modeled. I shall quote from the language of each of the opinions.

“Comstock, J. (p. 51): ‘I come next to the objection that banking associations formed under the general law of 1838, have no power to borrow money, and hence that this corporation could not issue its bonds, create the trusts, or give any valid assurance for a loan. This is a very grave proposition, opposed to the known practice of probably every banking institution in the State. It should, therefore, be well considered before it is received as the law. \* \* \*

“‘Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by



individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.; and in examining the powers of banking corporations, the nature and incidents of banking as a business, when not under special legal restraints, are in the highest degree important. It is true the question will always be one of corporate power rather than of the rules and principles of banking; but those rules and principles may have a decisive influence in the construction of charters which profess to confer powers of this description. And this leads me to observe that banking, regarded as a business and not as a franchise, includes the borrowing of money as one of its features or incidents. As no one denies this proposition, I will not dwell upon it further than to quote the remarks of an eminent English judge, Mr. Pemberton Leigh, chancellor of the Duchy of Cornwall, in a late case of the Privy Council (*The Bank of Australasia v. Breillat*, 6 Moore P. C., 152, 194).'

"He then quotes part of the same passage which I have just quoted from that opinion, and continues:

"'It may be quite material, when we come to examine the general banking act of 1838, to observe now, in passing, that in these observations, so just and forceable, the borrowing of money is spoken of, not as a *distinct department* or *branch* in the business of banking, but is asserted as the *incident and result* of two of its most important operations, *those of issuing and receiving deposits*.'

"He then proceeds to show that a banking partnership would undoubtedly have power to borrow money, and that a banking corporation must necessarily have the same power—unless expressly denied, not as a grant of power, but as an incident to the other powers granted, and shows that there are no restraints upon the power so long as it is exercised in the course of the banking business. His discussion of this branch of the subject runs from pages 51 to 66. In this opinion upon this subject Johnson and Bowen, J. J., concurred.

"The opinion of Brown, J. J., commences on page 133; that part of it which relates to the borrowing power begins on page 156. Having stated that the power, if given, is implied and not expressed, he says (p. 158):

"'Before we can say, with any assurance, whether the power to borrow money is to be implied, we must look at the

act under which the associations are created, and see the nature of the business in which they are to embark, the usual and customary modes in which it is conducted, the instruments and resources with which they are to be furnished, and the emergencies and hazards to which the business is necessarily exposed. Banking is a system of credits. Its circulation is upon credit, it receives deposits upon credit, and if it deals in exchange, either domestic or foreign, that, too, is upon credit, more or less. It discounts bills and notes upon the faith and credit that its circulation will not be suddenly returned for redemption, or its deposits suddenly withdrawn. It is thus that it multiplies its capital and realizes its profits. Take away its power to use its credit, and confine it to the use of its capital alone, and its business would perish. \* \* \* With its liabilities constantly due and open to demand, and its resources unavailable for the moment, it is easy to see that, without the power to obtain temporary relief in an emergency, institutions perfectly solvent would be driven to the wall. \* \* \* If there is any difference in point of expediency and safety between a sale of securities or a temporary loan, it is greatly in favor of the latter, for reasons which I need not name. I am unable to see why borrowing, under such circumstances, is to be deemed an act *ultra vires*. It does no more than create a debt. \* \* \* Banks should be lenders, and not borrowers of money; and it cannot be denied that a habitual and frequent resort to loans leads to disaster. This, however, is an abuse of the power, and no argument against its existence; nor is it any reason why it may not be judicially and beneficially exercised. \* \* \* So long as power is given to employ credit, as the basis of discount and circulation, the power to borrow must be implied, or the business cannot be usefully or successfully conducted.'

"The opinion of Shankland, J., begins upon page 164, and that part of it relating to this question will be found on pages 164, 171. Having shown that in the idea of a bank deposit there is nothing but a loan by the depositor to the bank, he continues (p. 166):

"In this last and widest acception of the term *deposit*, it was most probably used by the legislature of 1838; for it was well known in all commercial communities, at that period, and to all competent legislators, that borrowing money to lend again is a part of the legitimate business of banking. A

banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. (Gilbert's Pr. Obs. on Banking, 25; 1 McCulloch's Com. Dic., 86, 117.)

"I am unable to perceive any reasons of policy to deny to the banks the privilege of incurring obligation by way of loan while they can incur the like obligation by taking in deposits. In truth, the obligations we have seen are the same, except in name."

"Page 169: 'Although the power to borrow money may be justly predicated on the express power to receive deposits on the principles of construction above indicated, or may be found amongst the mass of unenumerated, incidental, and necessary ones, I prefer to put my opinion upon the broad ground that every corporation, unless prohibited by law, can incur obligations, as a borrower of money, to carry on the legitimate business for which it was incorporated, although not specially authorized to borrow by its charter. Such has been the uniform language of the courts in this country.'

"The opinion of Paige, J., begins upon page 182; that part of it relating to the borrowing power will be found on pages 209, 222. On page 210, he says:

"The power of the North American Trust and Banking Company to borrow money may be maintained as an incidental power necessary to carry on the business of banking. This power has always been claimed and exercised by banks of discount in all commercial countries. In the original charter, granted in 1694 to the Bank of England (Act of 5 and 6 William and Mary, ch. 20), the power of that bank to borrow, as an incidental power, was conceded by imposing a restriction in respect to the amount to be borrowed. The same concession was made by the enactment of the several acts of the British Parliament, restraining in favor of the Bank of England, all corporations, etc., from borrowing money on their notes, payable at a less time than six months. The Scotch banks exercise this power. It is one of the principal sources of their profits, to borrow at a low rate of interest, and lend at a higher. (3 Edin. Ency., tit. Bank, 220, 224; Cyclopaedia of Arts, etc., tit. Bank; 1 Chitty on Bills, 15, 16.) Beawes, in his *Lex*

*Mercatoria*, 384, says: "That the legitimate business of a bank of discount, deposit, and circulation, consists in borrowing money upon their own credit; lending money on good securities; buying and selling bullion; discounting bills of exchange or other secure debts; and receiving and paying the money of other persons." And at page 398, he says: "The Bank of England may borrow money on any contracts, and may give such security as shall be satisfactory to the lender." This power was always exercised by the old incorporated banks of this State, and it has also been exercised by the banking associations since the passage of the act authorizing their formation. It has been exercised by these banks as a legitimate power of banking, and as the necessary and usual means to enable the banks to carry on the business of banking:

"Page 214: *'The exercise of the power to borrow money is usual in the course of the ordinary business of a bank; and it is directly and immediately appropriate to the execution of the expressly granted powers.'*

"This power to borrow money for the legitimate purposes of the company may also be maintained as a power conferred upon it by the express terms of the general banking law, as an incidental power necessary to carry on its business of banking. It may be supported as an incident to some, if not to all, of the specific powers expressly granted, viz: the power to discount notes, etc., to receive deposits, to buy and sell gold and silver bullion, and bills of exchange, to loan money, to purchase public stocks to deposit with the comptroller, and such real estate as it was authorized to purchase. The old chartered banks exercised the power to borrow, to enable them to discount notes. I can see that a prudent exercise of this power by a bank, in anticipation of receipts from the payment of its outstanding paper, for the purpose of accommodating its customers, may be an appropriate means to enable it to exercise the power of discounting notes. So borrowing money to provide funds to be placed temporarily in the hands of a foreign correspondent, in anticipation of those to be supplied in the regular course of business, may be so useful and appropriate as to be regarded as an incidental power necessary to the sale of bills of exchange. \* \* \* The express grant of a general power to buy gold and silver bullion, etc., bills of exchange, public stocks and real estate, implies the power to purchase these things on credit; and the power to contract debts is a necessary result of the power to buy on credit. The debts

of a banking association, thus legally contracted in the course of its legitimate business, may become due at a time when; in consequence of unexpected losses or an unforeseen drain on its cash resources, the company, although perfectly solvent, may be unable to pay them. In such an emergency has not a banking association the power to extricate itself, and thus to avert its ruin by means of a temporary loan of money? It is very apparent to me that these associations, when placed in such circumstances, and even under any circumstances, have the power to borrow money for the purpose of paying their lawful debts.'

"While Judge Selden differed with his colleagues as to the authority of the North American Trust and Banking Company to issue the securities in question, this was not upon the ground that borrowing money did not fall within the scope of the banking business, but that the power to borrow given to this bank was limited so that it could be used only in aid of the branches of the banking business specifically named in the statute; and the securities in question were not issued under the exercise of any such power. He expressly concedes that borrowing is an ordinary incident of the banking business, his language upon that subject being as follows (pp. 255, 256):

" 'The receiver's counsel takes the broad ground, that banking corporations cannot borrow money, or, at least, that they cannot borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes cannot properly exercise. This position is not supported by any direct authority; and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it cannot be sustained. It is not in harmony with the present practice or the past history of banks. Banking for profit is based primarily upon the idea of borrowing, without interest, the various sums which the individuals of a commercial community must necessarily keep on hand unemployed, to meet any sudden emergency, and reloaning the money or the greater part of it upon interest. It may be said that banks may borrow, that is, receive deposits without interest, but cannot borrow upon interest. This, too, is untenable. One of the soundest banking systems known to the age, viz: the Scotch, is sustained to a great extent by sums borrowed at a rate of interest below

that charged by the banks. (Edin. Ency., 224, tit. Banks; Lawson's Hist. of Banking, 419.) The committee appointed by the House of Lords in England, in 1826, to inquire into the Irish and Scotch systems of banking, reported that it was "proved by evidence and by the documents, that the banks of Scotland, whether chartered joint stock companies or private establishments, have, for more than a century, exhibited a stability which the committee believe unexampled in the history of banking." (Lawson's Hist. of Banking, 434.) The country bankers of England also allow interest on the balances of money in their hands. (McCulloch's Notes to Smith's Wealth of Nations, 489, title Money, Edin. Ed.; Lawson's Hist. of Banking, 273.) Another writer, speaking of the practice of borrowing by the Scotch banks, says: "This is in fact a part of the proper business of a bank. A banker is a dealer in capital, an intermediate party between the borrower and the lender; he borrows of one party, and lends to another, and the difference between the terms at which he borrows and those at which he lends is the source of his profit." (Gilbert on Banking, 52.) It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question, were *ultra vires*, cannot be sustained on the ground that borrowing is a part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the general banking law itself. It is a question, not of appropriate banking, but of corporate power.'

"He then proceeds (pp. 256, 271) to discuss the question whether this corporation was given the power of borrowing money broadly in its general business, and reaches the conclusion that it was not; that such power was given for certain limited purposes only, within which the action taken in the case in hand did not fall; and hence concludes that the securities given were *ultra vires* and void. But he further declared (p. 283) that, in so far as the money advanced upon those securities was applied to the use of the bank, the holders of the securities were entitled to be ranked as creditors for money had and received.

"The conclusions of the whole court are set forth in fourteen propositions, stated on pages 294, 297. Of these, the

fifth, Judge Selden dissenting, declares that the North American Trust and Banking Company had power to borrow money and to issue time paper to secure a debt for moneys loaned.

"The last of the three cases mentioned above is *Ward v. Johnson*, 95 Ill., 215, decided in May, 1880. There a corporation called the Farmers, Merchants, and Mechanics Savings Bank had all the powers ordinarily given to a commercial bank, and, in truth, was such, as stated by the court on page 243, though styled a savings bank. This corporation established what it called an investment department, whereby certificates were issued for sums of \$100 and upwards, bearing interest at 7.3 per cent per annum, secured by a deed of trust whereunder certain specific property of the corporation was put into the hands of trustees. The corporation also did a general banking business. The bank having failed and been put into the hands of a receiver, it was contended, as in the case of *Curtis v. Leavitt*, 15 N. Y., 9, that these certificates were invalid because given for borrowed money. On pages 237, 239, the court, speaking through Mr. Justice Scholfield, after reciting the powers of the bank, say:

"In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money. \* \* \*

"The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. \* \* \* The business is simply that of a bank obtaining money, and, so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary."

"As stated above, other cases illustrating the judicial recognition which has been made of the power of banks to borrow money, will be mentioned later in discussing other propositions. To these I refer now, without stopping to quote from them. Indeed, after a thorough search, I can say that I have found but one case or reference thereto, aside from the decision in the case of the *Western National Bank v. Armstrong*, wherein it was intimated that borrowing money was not an ordinary incident of the banking business. That single instance is the



decision of Judge Blodgett, of the Northern District of Illinois, in the case of *Adams v. Cook County National Bank*. His opinion seems never to have been printed; at least, I have been unable to find it, and it has escaped the vigilance of the editor of the new series of Federal reports, known as 'Federal Cases.' Wherever it is mentioned, reference is given to Ball on National Banks, page 54, as the primary publication. The opinion is there stated to be in manuscript, and nothing is given to show the nature of the case, what questions were before the court, or whether its language upon this subject was decision or *obiter*. All that is said is the following:

"The power of a national bank to borrow money or to give notes is neither expressly nor impliedly given by the act. The business of the bank is to lend, not to borrow money; to discount others' notes, not to get its own notes discounted. A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money. The burden of proof in such cases would be upon the lender."<sup>(1)</sup>

"I submit that I have said enough to show conclusively that it is the reverse of truth to say that the borrowing of money is outside of the course of ordinary and legitimate banking. It may be unwise banking to pursue this course under ordinary circumstances; but, wise or not, it is certainly legitimate. Its wisdom depends upon the success with which it is done.

### "III.

#### "NATIONAL BANKS HAVE POWER TO BORROW MONEY.

"The National Banking Act, Revised Statutes, sec. 5133, provides that 'Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five.' The section then describes how the articles of association shall be prepared; section 5134 says what those articles shall contain, and section

(1) See *Central Trust Company v. Cook Co. Nat. Bank*, 15 Fed. 885, where Judge Blodgett held the bank liable on an indorsement of notes by the president without authority.—F.



5135 states how they shall be authenticated. Section 5136 gives the powers conferred upon such associations, from which I quote the third and seventh clauses:

“Third.—To make contracts.’

“Seventh.—To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by lending money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this title.’

“For comparison I quote also the equivalent parts of the eighteenth section of the New York General Banking Act of 1838, session laws of that year, chapter 260, page 249:

“Section 18. Such association shall have power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits, by buying and selling gold and silver bullion, foreign coins, and bills of exchange, in the manner specified in their articles of the association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business.’

“It will be observed that the Federal statute is modeled largely upon that of New-York, but changes the order by putting the clause as to incidental powers before, instead of after, the powers specifically named. The reason for this transposition is probably to be found in the opinion of Judge Selden, in the case of *Curtis v. Leavitt*, 15 N. Y., 9, which has just been referred to. As I have already stated, while he was of opinion that borrowing money was incidental to the banking business as ordinarily conducted, yet he was also of opinion that this power was not given to corporations organized under the New York act, and the reason for this he gives on page 266, saying, in substance, that the extent to which the banks may exercise incidental powers depends upon what is meant by the phrase ‘such business’ after the grant of those powers; and that if the words ‘such business’ as there used could be referred to the general business of banking, and not to that business as limited

by the specifications contained in the section, then he would be prepared to admit that all powers incident ordinarily to the business of banking were granted. In other words, he was of opinion that such business should be restricted to the business immediately before described, and not to the business of banking more remotely referred to. His colleagues did not agree with him in this construction, as has been already stated, and held that all powers incident to the business of banking were granted. The transposition in the Federal statute by which the business of banking is immediately, instead of more remotely, connected with the grant of incidental powers, was evidently made *ex industria*, to avoid the possibility of the argument made by Judge Selden being used in the Federal courts; for the draughtsman was Mr. Spaulding, of New York (*Briggs v. Spaulding*, 141 U. S., 132, 156), who was undoubtedly familiar with the discussion the phraseology of the New York act had caused. And so in the *First National Bank v. National Exchange Bank*, 92 U. S., 122, 127, this section was construed; and it was there held in effect that national banks, in transacting a banking business, might do everything which a natural person could do under like circumstances, except in so far as the statute expressly limited their power.

"In the *Western National Bank v. Armstrong*, 152 U. S., 346, no intent is expressed to limit the doctrine of the case just mentioned. The power of a national bank to borrow money is conceded; the statement of the court was that the exercise of this power was an extraordinary, and not an ordinary incident in the banking business. This latter proposition I have already discussed and shown, I trust, to be based upon a mistake of fact, and therefore not conclusive upon this court.

#### "IV.

#### "DIRECTORS OF A NATIONAL BANK MAY DELEGATE THE BORROWING POWER.

"This proposition also needs but little discussion. The statute contains no restrictions upon the powers of the directors in this behalf. No general rule of law, of which I am aware, can be cited which should be read into the statute as an implied limitation. The opinion in the case of the *Western National Bank v. Armstrong*, 152 U. S., 346, ex-

pressly admits the right to make a special delegation, and does not controvert the right to make a general delegation to do this particular act. The act of borrowing is one which cannot well be performed by the directors as a body; from the necessity of the case, they must delegate its execution to one or more persons; and they may, with this, delegate discretion in the manner of exercising it. Instances are furnished by the cases of *Fleckner v. Bank of United States*, 8 Wheaton, 338, and *Ridgway v. Farmers Bank of Bucks County*, 12 S. & R., 256. Others have been given in the cases already referred to in discussing the nature of borrowing power. And still others will be found among the cases referred to under the next proposition."

The argument of Judge Worthington seems to us a conclusive refutation of the proposition that even borrowing in the common acceptance of that term is outside of the ordinary and legitimate course of banking business, especially as applied to the business of all banks at all localities and all seasons. At all events it sheds much light upon the questions discussed in this case, and we are indebted to Judge Worthington, not only for this, but for other valuable information and suggestions, which we shall use here in argument.

## II.

**The transaction in this case (rediscount) was not out of the course of ordinary and legitimate banking business. It was within the express powers granted by the statute. Nor is it a borrowing of money within the meaning of the statute, nor of the Western National Bank case.**

However similar the result of a rediscount of negotiable paper may be to that of a loan to a bank, there is a marked dis-

inction between the method of accomplishing such results, the custom and usage of the banks and the essential merits thereof. In offering its own note for the purpose of securing money the bank only offers its own promise. The value of that promise is measured by the ability of the bank to pay. It may overreach the capital stock of the bank, or it may anticipate that which has not been paid in. The bank becomes *primarily* liable.

On the other hand the negotiable securities of a bank may, and usually do, form the principal part of the assets of the bank. These may consist of bonds, notes, or even stocks, as well as gold coin. As is well known to every one who has any knowledge of the business of banking, it is not an unusual thing that at times an accumulation of such funds becomes so great as to absorb more of the bank's cash than it can spare and meet the demands of its customers, and it becomes necessary to dispose of some of its securities in order to obtain the necessary supply of money. It may dispose of government or other bonds, or stocks, and no one would think it an unusual transaction. Why may it not dispose of a promissory note for the same purpose? Banks buy and sell exchange, and the indorsement of the bank carries with it the same liability as the indorsement of a note. This liability is only secondary or conditional, whereas the liability for borrowed money is primary. It is the business of banks to supply their customers with money as much as it is the business of merchants to keep on hand goods with which to supply the demands of trade. It is a common thing for money to be in greater demand during certain seasons of the year in

some parts of the country than in others, and this is especially true in the South and West. The small country bank has to call upon the larger banks in the cities, and these banks in turn call on the still larger banking institutions in the East, and likewise these banks extend their business to Europe. This is principally carried on, as a rule, through the method of rediscounts; and, as is shown in this case, the bank making the rediscount usually does so at a less rate than it exacts from its customer, by which it derives a legitimate profit. These are well known incidents of banking of which the courts will take notice.

The right of banks to rediscount and dispose of negotiable paper has been recognized and uniformly adhered to by the courts from an early period.

In *Planters Bank v. Sharp et al.*, 6 How., 322, 323, this court discusses and recognizes it. And so self-evident and unquestioned is the power that the court in *Marvine v. Hymers*, 12 N. Y., 223, expresses surprise that the court in the *Planters Bank* case should have stopped to discuss it.

4 Thompson on Corp., sec. 5754.

In *Wild v. Bank of Passamaquoddy*, 3 Mason, 506, Judge Story said: "The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and in its behalf. No special authority for this purpose is necessary to be prov "

4 Thompson on Corp., sec. 4789, and authorities cited.

Sturgis & Co. v. The Bank of Circleville, 11 Ohio St., 153.

In Bank of Genessee v. The Patchin Bank, 13 N. Y., 309, the indorsement was for accommodation; it was held that while a banking corporation may become the indorser of and procure paper owned by it to be discounted for the use and benefit of such banking association, it is not authorized to make an accommodation indorsement; but if it be proved that the party discounting paper indorsed for accommodation advances money upon it to and at the request of the bank in good faith, relying upon its representations that the paper belonged to and was indorsed and discounted for its use and benefit, the banking corporation would have been liable upon the contract of indorsement, and that the cashier of the bank securing the rediscount, making the representations, acts for the bank.

Denoi, J., said: "I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. In this respect it has the same right as any other holder of such paper. (Marvine v. Hymers, 2 Kern., 325.)

"The power of a bank to avail itself of its assets in this way (rediscount) is as perfect as that of any merchant. The authority to do so is important, if not quite essential to the existence of these institutions. The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes. \* \* \* The

indorsement of the bank was therefore void in the hands of every person having notice of the facts; but if the proper officers of the defendant have negotiated to the plaintiff, representing it to be a bill belonging to their bank, and upon the faith of that representation the plaintiff has in the usual course of business discounted it, advancing to the defendant the proceeds, the defendant is precluded, upon the principle referred to, from setting up that it was indorsed without authority (page 316).

"It was transmitted to the plaintiff in an official letter written by that officer (the cashier), with the request that the plaintiff would discount it. It is not said in terms in the letter that the discount was applied for for the benefit of the defendant, but this is as strongly implied as though it had been stated, as no other party is alluded to and there was nothing in the tenor of the bill or in the terms of the letter to suggest the idea that the former was accommodation paper, or that any other party than the defendant had an interest in the transaction which the letter invited.

"Upon the facts of the transaction, it presents the case of one bank sending one of its discounted bills to another bank to be rediscounted for its use, and there is no evidence that the plaintiff's officers knew or suspected that this was not actually the case. It was, therefore, a correct instruction to be given to the jury that the plaintiff was entitled to recover, though they should find that the bill was drawn and was indorsed by the defendant for the benefit of the railroad company and in order to raise money for its accommodation, provided it appeared that the plaintiff discounted it in good faith in consequence of a representation by defendant that it was its bill."

*Houghton v. First Nat. Bank*, 26 Wis., 663; S. C., 7 Am. Rep., 107.

In *Bank of Genessee v. Patchin Bank*, 19 N. Y., 314, 315, the court said: "That the defendant had the right to procure its paper to be rediscounted for the use of the bank is well settled, and is not now questioned by the defendant's counsel."

*Pratt v. The Topeka Bank*, 12 Kan., 571.

In *West St. Louis Savings Bank v. Parmelee et al.*, 95 U. S., 557, the court said: "Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business."

In *The Bank of the State v. Wheeler*, 21 Ind., 90, the cashier, without authority of the directors, and against their wishes, discounted a note for the accommodation of a customer and then rediscounted it by indorsement with another bank, and to conceal the transaction made false entries upon the books of the bank. The bank when sued on the indorsement defended on the ground that the indorsement was made by the cashier, as was or might have been known by the plaintiff, for the accommodation of other parties, without authority from the bank, but the bank was held liable.

The court said: "It follows that the bank was liable upon the indorsement made by the cashier, and the judgment for the plaintiff was right if the purchase by Wheeler was *bona fide*. It would certainly greatly embarrass monetary and mercantile transactions, if every man who bought and sold gold and silver and commercial paper at the counter of the bank, or to the cashier, was compelled to call for the records of the bank to see that the cashier had the powers he assumed,



being within the general scope of the authority of such officer. The directors of the bank are not usually in perpetual session, while the business of banks is occurring every day, and must, of necessity, be transacted by officers in charge, or not at all. The public interest requires that the banks should be bound by the acts of their officers in their ordinary business. \* \* \*

The case, in one view of the evidence, is this: A person comes to town to sell, or to get discounted, a note. There are two banks in town; one has plenty of money to spare with which to buy the note, but refuses to do so because it is not certain as to the goodness of the paper; the other is hardly able to spare the money for the purchase of the note, but is satisfied of the goodness of the paper and is desirous to purchase it, and is willing to do it if it can ascertain where it can sell the paper, and raise the money, if finding itself in need. It learns that bank No. 1, in the town, will buy the paper if it is offered to it by bank No. 2, with its indorsement on the paper. Bank No. 2 accordingly buys the paper, and afterwards sells it to bank No. 1. We see nothing in this but a legitimate transaction."

*Jones v. Hawkins*, 17 Ind., 550.

In *Cooper v. Curtis*, 30 Me., 490, the court said: "It is part of the ordinary business of banking corporations to negotiate bills of exchange and promissory notes. Under the authority to sell and convey the property of the bank, it could transfer negotiable paper in the mode usually practiced. The indorsement made by the cashier, acting in his official capacity for the bank, is sufficient evidence that he acted by its authority."

*Farrar v. Gilman*, etc., 19 Me., 440.

In *Davenport v. Stone* (Mich.), 62 N. W., 722, the cashier of a bank took a note from a customer, which was never entered on the books of the bank. He rediscounted the note with another bank, indorsing the same with his bank's guaranty. The financial management of the bank had been intrusted by the board of directors to him. On suit on the bank's indorsement the defense was set up that it was unusual for banks to rediscount paper and that the cashier had no such authority. The court, after reviewing the cases of *Bank v. Armstrong*, 152 U. S., 346, and *Lamb v. Cecil*, 25 W. Va., 288, and 28 W. Va., 653, the only cases presented in support of the defense, and showing that they had no application to the case, said: "The question, however, is reduced to the power of the board of directors; for as already shown, if the board had the power, and the cashier exercised it under the above facts, his act binds them. We are not concerned to determine whether such a power is wise or unwise. Much can be said against it. It would, however, be a surprise to the banking interests of the State to find that no such power existed. It has been exercised for many years, and in the course of the business the transferring bank makes itself liable by indorsement. The rediscounting bank must, of course, rely upon the liability of the transferring bank, with whose responsibility it is familiar. The extent of this business will be seen from an examination of the reports of the commissioner on banking, under the heading, 'Notes and Bills Rediscounted.' An examination of the report of 1893, discloses that there were sixty-eight State banks and forty-five national

banks in this State carrying rediscounted paper. The amount of such paper, December 19 of that year, was nearly \$1,100,000. There must, therefore, have been a consensus of opinion among the attorneys for these banks, that such power existed. We need not discuss the subject further. The authorities fully sustain this power. *People's Bank v. National Bank*, 101 U. S., 181. *Bank v. Wheeler*, 21 Ind., 90. See also, *Bank v. Perkins*, 29 N. Y., 554. *Cooper v. Curtis*, 30 Me., 490. Plaintiffs rediscounted this paper in the usual course of business, and without any notice or reason to believe that the cashier had not full authority." The doctrine of this case is again affirmed by the same court in *First National Bank of Kalamazoo v. Stone*, 64 N. W., 487.

The statute (Rev. Stat., sec. 5156, clause 7) defines the powers of national banks as follows:

"To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and *negotiating* promissory notes, drafts, bills of exchange and other evidences of debt."

Here the power to negotiate is given in express terms, the same as the power to *discount*. The statute applies with as much force to "negotiating promissory notes" as it does to negotiating "drafts, bills of exchange and other evidences of indebtedness."

In *People's Bank v. National Bank*, 101 U. S., 181, where the vice president of the defendant bank had, by guaranty of payment, without authority from its board of directors, induced the plaintiff bank to discount certain negotiable notes made by a debtor of the defendant bank to his own order and

indorsed in blank, the proceeds being turned over to the defendant bank, this court, speaking by Mr. Justice Swayne, after quoting from Revised Statutes, section 5136, as above, say (page 183):

“To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, ‘waiving demand and notice,’ and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it.”

In *Thomas v. City National Bank* (Neb.), 58 N. W. Rep., 943, the facts were almost the same as in the case at bar, and the same defense was interposed, but the court, following and approving the case of the *People's Bank v. Manufacturers National Bank*, 101 U. S., 181, held, that it was within the powers of the bank to negotiate the paper, and that the authority of the president to bind the bank would be conclusively presumed in favor of the purchaser acting without notice to the contrary.

The power is still further emphasized by the statute (sec. 5200) in that after it prohibits the banks from allowing any one person, firm, etc., to borrow more than one-tenth of the capital stock of the bank, it expressly provides that “the discount of commercial or business paper \* \* \* shall not be considered as money borrowed.”

If the position of counsel that rediscounting is borrowing be sound, this provision of the statute is without meaning, and the New York Bank has been guilty of a violation of the law,

because it is shown that the amount of rediscounts at the time the paper in controversy was taken was greatly in excess of 10 per cent of the capital stock of the New York Bank. If, however, there was no violation of the statute, then the position of counsel cannot be correct.

In the Western National Bank case the court indicated a doubt as to whether or not banks have power to borrow, and, after quoting the statute (secs. 5136, subdivision 7), which expressly grants the power to discount and negotiate promissory notes, says: "The power to borrow money or to give notes is not expressly given by the act." Now, we presume, no one will contend that the court intended to hold, notwithstanding the express language of the statute just quoted by it, that it does not confer the power to negotiate promissory notes as well as to discount them, the same as in cases of drafts, bills of exchange, etc., and yet, if borrowing and rediscounting be the same thing, this is just what the court did say. Of course, this court could not have intended any such folly. It could not have been unmindful of the express language of the statute. Nor can we presume that it could have been unmindful of the self-evident proposition that the very power to discount negotiable notes implies the power to negotiate the same, else why make the notes negotiable. This proposition was clearly elucidated by the court in *Planters Bank v. Sharp et al.*, 6 How., 322. Nor was it attempted to be shown in the Western National Bank case that the transaction between the two banks was in harmony with a previous course of business, which had grown up and existed between them, nor that the vice president had been in the habit of attending

to such things, nor that it was a customary transaction with the banks in that locality, or in that State, as was shown in this case.

In this connection we call attention to the reports of the Comptroller of the Currency, which we offered in evidence, made in 1893, pages 273 and 299 (Tr., pp. 51-52), as well as those to which Judge Worthington has referred (page 21 of this brief), and which show that rediscounting formed a very large item in the transactions reported to the comptroller, and could not have been an unusual occurrence. Besides the fact that it was a common thing for banks in the State of Arkansas, and generally throughout the United States, to rediscount, as shown by the reports of the Comptroller of the Currency, the fact that it was the custom, not only of the First National Bank, but of all the banks in Little Rock, to rediscount, was not questioned (Tr., pp. 46-51). It is not questioned that at least one other bank left the matter of rediscounts entirely with the president and cashier. It is not questioned that the board of directors of the First National Bank exercised no supervisory control over the matter of rediscounts whatever, and that was left entirely with the president and cashier. It is not questioned that Allis was the principal officer in charge of the bank and had the general management of its affairs; that the matter of rediscounts was, as a rule, referred to him and he directed when and where the same should be made (Tr., pp. 48, 49, 53, 60). It is not questioned that the bank frequently made rediscounts to a large amount, and that this fact was known to the board of directors. The board of directors in so far as rediscounts were concerned had effectually vested

that power in the president and cashier if not in the president alone. Under these circumstances no special authority was required in order to enable the president and cashier to make rediscounts. They were simply exercising the authority previously vested in them by the board. If necessary, special authority will be presumed. In this respect they possessed all the powers of the board. It was proven (Tr., pp. 12, 13) that the correspondence and transactions were such as are usual for the president and the cashier of a national bank to carry on and exercise, this testimony is uncontradicted.

What may be an unusual or extraordinary transaction in one place may be quite common or ordinary in another. In some States the receipt of special deposits is considered outside of the regular course of banking business, and not within the authority of the cashier, while in others it is a common practice among all the banks and the power of the cashier is not questioned.

1 Morawetz on Corp., sec. 540 (2d Ed.).

Wiley v. First Nat. Bank, 47 Vt., 546.

Whitney v. First Nat. Bank, 50 Vt., 388.

Patterson v. Syracuse Nat. Bank, 80 N. Y., 82, 94.

National Bank v. Graham, 100 U. S., 699.

Banner v. Bank of Columbia, 9 Wheat., 583.

This is true in reference to the custom of any particular bank, without regard to locality. If a bank becomes accustomed to doing a certain line of business, or adopts or acquiesces in certain methods of business carried on by its officers, it will be held liable therefor, as if special authority had been granted.

1 Morse on Banking, sec. 9.

Bank v. Graham, *supra*.

Wing v. Bank (Mich.), 61 N. W., 1009.

Davenport v. Stone (Mich.), 62 N. W., 722.

Bell v. Hanover Nat. Bank, 57 Fed. Rep., 821.

Cox v. Robinson, 70 Fed. Rep., 760; affirmed, 82 Fed. Rep., 283.

Simmons v. Fisher, 55 Fed. Rep., 909.

Fisher v. Simmons, 64 Fed. Rep., 313, 314.

The cases relied on by counsel to sustain the position that there is no difference between borrowing and rediscounting, principally arise where usury or some violation of the statute was pleaded against the bank taking the paper, and it is simply held that a discount is one method by which the bank puts its money at interest. They do not affect the question as to the power or custom of a bank to negotiate its own paper, nor do they hold that when a bank does so it is borrowing. The distinction is clearly drawn by the court in the case of *Bank of Alexandria v. Mandeville*, 1 Cranch (C. C.), 556, as follows:

“The distinction between an anticipation of funds by discount and a loan of money upon interest exists in the nature of things. Suppose I shipped a cargo of flour to a merchant in Boston, who, in payment remits me a bill of exchange at sixty days sight, upon a merchant at Alexandria, who accepts it. I wish to anticipate this fund. I apply to the bank to discount it. Do I ask for a loan? Do I wish to borrow money? No. I am entitled to the receipt of a sum of money at the end of sixty days, but I wish to anticipate the receipt of it. I wish to receive it now instead of then. The bank discounts this bill. If it were a loan from the bank to me, I should be the principal debtor, and the first person liable to the bank; but in truth, by indorsing the bill to the bank, I became only a collateral or a conditional debtor. The acceptor is the principal debtor to the bank, and to him must they first



apply for payment; if not paid they must protest, and give notice to me of the nonpayment as soon as possible, under all the circumstances, and, if they neglect to demand payment from the acceptor, or to give me due notice of nonpayment, they have no claim upon me. Can this, then, be a loan of money from the bank to me? Nothing can be more different. I am only liable as the indorser of a bill. If it were to be considered a loan at all, it should rather be a loan to the acceptor, the principal debtor in the transaction. But it is not a loan to any person; it is a mere accommodation in shortening the time of payment. It was said, in argument, the transaction must either be a loan of money or a purchase of the note, and that it could not be a purchase if the vendor guaranteed the bill by indorsement and that the bank was not authorized to trade in the purchase of bills, consequently it must be considered as a loan. This is clearly a *petitio principii*. It assumes the principal in dispute. *There is a transaction which is neither a loan nor a purchase of the note, and that transaction is discount.* If it be not a loan, it cannot be a forbearance of a sum of money lent; if it be neither a loan or a sum of money lent, it is not a transaction prohibited by the statute of usury.

“A clear case, then, of mercantile discount, being the anticipation of funds, and not a loan of money, is not within that statute. Thus stands the case upon general principles of law and reason.”

S. C., 2 Federal Cases, No. 850, p. 607.

Nichols v. Feason, 7 Pet., 109.

In *Planters and Merchants Bank v. Goetter*, 19 S. O. Rep., 54, it was held that money loaned by a bank at an usurious rate of interest on notes taken, payable at a future day, was not a discount within the meaning of the statute of Alabama.

The statute confers the same power on national banks to discount and negotiate promissory notes that it does to receive deposits. To receive deposits is one method of borrowing—is more like borrowing than is rediscounting—yet it is distin-

guishable from borrowing, as held in *State of Nebraska v. First Nat. Bank of New Orleans*, 88 Fed. Rep., 947.

The opinion of the court of appeals in this case (79 Fed. Rep., 296) is well considered, and clearly draws the distinction between borrowing and rediscounting, and between this case and the *Western National Bank* case. That case is still further distinguished and limited in <sup>its</sup> the application by the very carefully considered and able opinions in the cases of *Chemical Nat. Bank v. Armstrong*, 76 Fed. Rep., 339, and *Armstrong v. Chemical Nat. Bank*, 83 Fed. Rep., 556, where it is held that the bank was liable for money borrowed under circumstances similar to this case. To these cases we especially call the attention of this court.

Counsel (page 10) quote as follows, from 1 *Morse on Banking*, sec. 117: "Thus the making of discounts is an inalienable function of the directors," and argues that the board of directors had no power to invest any officer with authority to make rediscounts. But counsel overlooks the fact that this quotation reflects to the powers of the directors in reference to the paper of others offered to the bank for discount. Whether the author is correct to the extent to which the rule is announced we need not here stop to inquire, but whether correct or not it does not refer to the powers pertaining to the rediscount of the paper of the bank when offered to another in order to obtain funds with which to carry on the business of the bank and meet the demands of its customers. Had counsel read a little further he would have seen that the same author in the next section (118) states an entirely different rule as applied to the indorsement of notes.

The power to negotiate notes and make rediscounts must in the very nature of things be vested in some officer, the cashier, president or vice president, or all of them. It cannot in the nature of the case be exercised by the board, as in the case of a party who comes to the bank to offer his note for discount, and where the importance of scrutinizing the security offered may be well looked to. Besides the reasons for not allowing the power to be delegated when it comes to passing upon notes offered for discount do not apply as to the rediscount of paper. In the one case the money of the bank could be easily squandered by an indiscreet cashier or president; whereas, in the other, if he simply rediscounts the paper of the bank, the bank gets the money for it, and there can be no danger of loss if the officer acts honestly, and due caution was exercised by the board in taking the note in the first instance.

In Morse on Banking, sec. 65, pp. 145, 146, it is said:

"But a warranty of goods sold by the bank, or an indorsement of guaranty of a note negotiated by it, is perfectly lawful; for, besides being rendered necessary and proper by the usual habit of business and by the nature of the case, such transactions are not open to the objections above. They are not contracts upon air; the bank receives value and has a real interest; with reasonable care the chance of loss is small, no greater than in many other acts necessary in carrying on its business (no sum of money is put at more than two risks by such transactions), and even if loss occurs it is attributable to the carelessness or misfortune of the bank in acquiring the subject-matter, not in guaranteeing it, and such agreements are not dangerous to the financial health of the community, but beneficial to it."

III.

**The parties did not treat the transaction as a borrowing of money.**

The effort of counsel for plaintiff in error to show that the transaction in this case is one of borrowing, and so treated by both parties, is not sustained by the facts disclosed in the record.

The proposition contained in the first letter written by the New York Bank to the Little Rock Bank (Tr., p. 16) was as follows: "We will give you 2 per cent on your daily balances, granting you our best collection facilities, taking your foreign items east of the Mississippi River and crediting them to your account immediately without charge.

"If you will send us \$50,000 of your good, short time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent." To which the Little Rock Bank through Allis, as president, replied, among other things, as follows (Tr., p. 17):

"I inclose herein \$50,000 of our best short time, well-rated bills, and also the signatures of our officers. Our average balance with you will be above \$10,000, and I trust the connection may be a long and satisfactory one. After the maturity of this paper we shall have nothing to offer you in the way of *rediscounts*, except the paper of country banks, and I hope you can see your way clear to continue this 4 per cent rate during our cotton season."

All the subsequent transactions were of the same nature. The correspondence on both sides use the terms "discount" and "rediscount," and the letter of the Little Rock Bank to the New York Bank relating immediately to the transaction

in question (Tr., pp. 25, 26), says: "It will be necessary for us to make further *rediscounts*." Counsel ignore all this correspondence, and bases his argument largely on the fact that at a subsequent date an officer of the New York Bank who had not conducted any of the previous correspondence, in answer to a letter from the Little Rock Bank, asking for further discounts, inadvertently used the words "loan" and "borrowing" in connection with a reference to "a panic in Wall Street, for several days; money loaning as high as 40 per cent." No significance can be attached to this. The inadvertence is apparent on the face of the letter, especially when taken in connection with the letter of the Little Rock Bank to which it was an answer, and other letters relating to the transaction, in all of which the term "discount" is used, showing that both the Little Rock Bank and New York Bank understood the transaction not to be a loan (Tr., pp. 28, 29). Besides all the officers of the New York Bank testify that it was an inadvertence (Tr., p. 12).

Nor can any significance be attached to the fact that the New York Bank, in its letter October 11 (Tr., p. 33), suggested to the Little Rock Bank that "you should at least have had funds with us to cover your paper maturing with us." It was one of the terms on which business relations were established between the two banks that a balance should be kept with the New York Bank for which the Little Rock Bank was to be allowed 2 per cent. It is a well known custom among all banks that the bank offering paper for rediscounts for the sake of its own credit and that of its customers, and to facilitate the business of rediscounting, especially that ex-

isting between correspondents as in this case, shall see to it that the bank holding the paper is put to no delay or trouble in collecting the paper. Hence the paper is usually—though not always—sent to the offering bank for collection. It makes the collection on the date of maturity, and takes credit against the holding bank for the amount, while the latter bank, on the same day, charges the offering bank with the amount of the notes, and, if that bank has not enough funds with the holding bank to meet the charge, an overdraft at once appears on the books against it. The rule is well established, that any bank has a right to charge any liability accruing to it from a person with whom it does business, whether by way of check, promissory note, or indorsement against the account of that person, and the New York Bank in this case did nothing more than exercise a legal right.

1 Morse on Banking, secs. 324, 327, 328, 329, 337, 338.

The testimony of the officers of the New York Bank is explicit as to the course of dealing between the two banks; they say: "We had the usual business transactions with the First National Bank of Little Rock, Ark.; they sending us remittances for their credit almost daily, and continually checking on us, as shown by copy of account current herewith, Exhibit 77.

"Q. 4. Were any of the dealings between said banks other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

"A. No.

"Q. 5. Were the notes in controversy received and rediscounted by the United States National Bank in any way other than in the usual course of business or different from any of the other notes rediscounted by it for the First National Bank of Little Rock, Ark.?

"A. No" (Tr., pp. 12, 13).

This is not contradicted.

Counsel (Tr., p. 18) says: "Exhibit 77 shows that every discounted note was charged to the Arkansas Bank at maturity *without an effort to collect from the makers, and without awaiting returns from Little Rock.*"

In the use of the language italicized by us, counsel is mistaken. There is nothing in Exhibit 77 (Tr., p. 44) which justifies any such assertion.

Again, counsel in order to support his contention in this respect, is forced to put a strained construction upon the testimony of Johnson (Tr., p. 47), and of Davis (Tr., p. 51), when he says in his brief (Tr., p. 19): "The proof in this case, in addition to the above, is that bankers regard rediscounting as borrowing." Johnson clearly shows that while banks obtain money both by borrowing and rediscounting, that rediscounting is in the nature of a sale of the note, instead of the execution of one; that rediscounting is the most common way of obtaining money by banks, and borrowing is rarely resorted to. Davis simply says that since the decision by this court in the *Western National Bank v. Armstrong*, the New York, St. Louis, and Chicago banks require evidence of the authority of the officer to make a rediscount, and counsel as if in desper-

ation, urges that this shows that the bankers have construed the Western National Bank case to apply to rediscounts. If this were true, it would not change the effect of that case as a precedent or as to the real point decided. But because the bankers, after that decision, required a showing of authority as to rediscounts, is no evidence or even an argument that they construed the decision to require it. Considering the cautious habits of bankers, the timidity of capital, and the fact that some of the language contained in the opinion is such as to make the oldest banker uncertain of the safety of any business method theretofore followed, however ancient, the more reasonable inference is that out of an abundance of caution, bankers have adopted the rule to require a showing of specific authority on the part of officers to rediscount as well as to borrow. The argument of counsel along this line brings out strikingly the inconsistency of his contention as to the meaning of the opinion in Western National Bank case, as well as the fallacy of the *dicta* it contains, in that to sustain that case as applied to rediscounting, he finds it necessary to resort to the custom and practice among bankers in reference thereto, while at the same time insisting that that case has undertaken to lay down fixed rules applicable to the conduct of the business of every bank without regard to the previously well established custom and usages of those banks, whether general, local, or those which the banks immediately concerned have adopted and practiced in a well established course of dealing, as in this case.

If we are to rely upon custom and what the bankers think and do, then we have but to turn to the testimony of the wit-



nesses Johnson (Tr., p. 46), Walker (Tr., p. 48), Davis (Tr., pp. 50, 51), and the officers of the New York Bank (Tr., pp. 12, 13); the reports of the Comptroller of the Currency (Tr., p. 52, and references thereto by Judge Worthington, *supra*), and as to the custom and usage of this Little Rock Bank in particular—the testimony of Walker, already referred to, its reports to the comptroller (Tr., p. 54), the correspondence between the two banks (Tr., pp. 16-29), as well as the witnesses for the receiver (Tr., pp. 52-64), all of which show that rediscounting is one of the ordinary transactions of banking business common to banks everywhere, and especially as applied to Little Rock banks, and the First National Bank in particular, and that these transactions between the New York Bank and the Little Rock Bank were so common and of such long standing as to justify the most prudent person in granting rediscounts, as was done in this case.

Again counsel shows the utter inconsistency of his position and the fallacy of the Western National Bank case as applied to this when he says (page 19 of his brief): "Other notes which had been regularly discounted by the United States Bank for the Arkansas bank had been paid in the same way, and the United States Bank evidently treated the last transaction exactly as it had done the others." If, as he is forced to admit—as a matter of fact—the other notes "*had been regularly discounted \* \* \* and the United States National Bank* evidently treated the last transaction exactly as it had done the others"—all of which is true—how can it be said that this transaction, whether one of borrowing or of rediscount, is "so much out of the course of ordinary and legitimate banking

as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money?" If the previous transactions extending over a period of five months, and involving more than \$175,000, were regular, and the last transaction was treated exactly like the others, why should the New York Bank be required to exercise any more diligence in this case than in the others? Why should it not at least be allowed the protection of the well established rule that when a course of business has been adopted and acted upon between two parties through their agents, they have the right to rely upon anything done in accordance with such course of dealing?

Merchants Bank v. State Bank, 10 Wall., 604.

Bank of Lyons v. Ocean Bank, 60 N. Y., 278.

Armstrong v. Chemical Nat. Bank, 83 Fed. Rep.,  
556.

Chemical Nat. Bank v. Armstrong, 76 Fed. Rep.,  
339.

N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y., 64

The contention of counsel that "it was unusual for banks in Little Rock or elsewhere in the South to discount at that season of the year" is not sustained by the evidence. It is true Johnson says (Tr., pp. 46, 47) it was usual to rediscount in the latter part of summer, commencing with August, and that "it was not very often that rediscounting was done at other seasons." But counsel overlooks the well-known fact that the chief purpose of rediscounts by banks in the South is to enable them to handle the cotton crop, and that the season for this commences the latter part of summer and extends on

to January or later, and when Johnson speaks of the season he refers to the season for handling cotton. This is evident, as will appear from the first letter to the New York Bank (Tr., p. 17), and from the excuses contained in almost every letter written by the Little Rock Bank, asking for more re-discounts. Besides the reports of the Arkansas banks to the comptroller (Tr., pp. 51, 52) already referred to show that re-discounts amounted to more in December than any other month. And the reports of this Little Rock Bank to the comptroller (Tr., p. 54) show that its rediscounts ran through to May and July.

Again, counsel is not sustained by the record when he contends that the transaction in this case was made upon an unusual length of time. Four of the notes were to run four months and one for five months. By referring to the correspondence (Tr., pp. 17, 22, 23) it will be seen that the notes of both the City Electric Street Railway Company and McCarthy & Joyce Company, as well as others, running four and five months, were rediscounted, and that it was a usual transaction between the two banks.

#### IV.

**Allis, as president, had authority by virtue of his position to make rediscounts for the Little Rock Bank, and to bind it by indorsement in the name of said bank.**

Two opposing theories exist as to the implied or inherent powers of the president of a corporation. One ascribes to him *prima facie* the powers of its managing agent for its ordinary

business, and the other denies to him any power whatever to bind it as its contracting agent, unless that power is specially conferred by the board of directors. In Thompson on Corporations, sec. 4617 *et seq.*, the authorities on both sides of the question are collated and the author, at section 4620, with much clearness, analyzes the question as applied to presidents of banks, and sustains the theory of his implied powers. Under this theory it is held (sec. 4621) that the president of a bank may "indorse its negotiable paper for the purpose of transferring title to it in the ordinary course of business." Citing among others, the case of *Palmer v. Nassau Bank*, 78 Ill., 380, where the point was directly ruled in favor of the power of the president. This is also sustained by this court in:

*Merchants Nat. Bank v. State Nat. Bank*, 10 Wall,  
604.

*People's Bank v. Mfg's Nat. Bank*, 101 U. S., 181.

See also to same effect:

*Thomas v. City Nat. Bank*, 58 N. W., 943.

*American Exchange Nat. Bank v. Oregon Pottery  
Co.*, 55 Fed. Rep., 265.

4 Thompson on Corporations, secs. 4638, 4639.

*Belleville Sav. Bank v. Winslow*, 35 Fed Rep., 473.

*State Bank of Ohio v. Fox*, 3 Blatchf. (U. S.), 431.

*National Bank of Commerce v. Atkinson* (Kan.), 54  
Pac Rep., 8.

*Goodrich v. Reynolds*, 31 Ill., 490; '83 Am. Dec.,  
240.

*Patten v. Moses*, 49 Me., 255.

2 Morawetz on Corporations, secs. 610, 611.

It will be noted that the National Banking Act, unlike most statutes chartering corporations (see for example S. & H. Dig. of Stat. of Ark., sec. 1330: "The stock, property, affairs and business of every such corporation shall be under the care of, and shall be managed by, not less than three directors," etc. City Electric Street Ry. v. First Nat. Bank, 62 Ark., 33; S. C., 84 S. W. R., 89), does not vest the corporate powers exclusively in the board of directors. The provisions upon the subject are found in the fifth, sixth, and seventh clauses of section 5136 of the Revised Statutes of the United States. These, so far as material to the point under discussion, authorize the corporation as follows:

"5. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers; define their duties.

"6. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"7. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

Thus while the board of directors is given authority to define the duties of the officers of the bank, and also, through by-laws, to declare how the powers of the bank in conducting its business shall be exercised, yet this is not obligatory. If the board does define the duties of any officer, this may act as a limitation upon his powers. If the board passes any by-laws regulating the conduct of business, these also may limit

the powers of the officers. But in the absence of limitation thus imposed, every officer of a bank is empowered, by force of the seventh clause, to exercise all those functions which, by the ordinary usage of business, are vested in officers of the same title or degree. In other words, there need be no express delegation of authority from a board of directors to an officer. His mere appointment clothes him with all the powers, and imposes upon him all the duties ordinarily attached to that office, according to business usage. It needs an express resolution or by-law to shear him of any of those powers or duties.

*Briggs v. Spaulding*, 141 U. S., 132, 144, 146.

*Cox v. Robinson*, 70 Fed. Rep., 762.

There is nothing whatever in the record to show that the authority of Allis had been in the least restricted. Not only is it beyond dispute that he had exercised this authority through a long series of important transactions with the New York Bank, but it is shown by the proof (Tr., pp. 12, 13) that it was usual for the president of a national bank to exercise such authority. The proof is also unquestioned that he exercised these powers without question from the board, as testified by Walker (Tr., p. 48), in that he always directed when, where, and what amount of rediscounts should be made; and, as testified by Kupferle (Tr., pp. 56, 57), acted as general manager and had general control of the bank, directed most or all the business while there, and the cashier as a rule acted under him. And as admitted by all the members of the board who testified, that the board exercised no authority or supervising control over the matter of rediscounts. All these facts were undisputed. And even if the question as an ab-

abstract proposition be determined against us, the authority of Allis is clearly established by the evidence.

The effort of counsel to distinguish the case of *People's Bank v. Manufacturers National Bank*, 101 U. S., 181, from this is not sustained by the facts or principle involved. It is not shown with whom the agreement was entered into in that case, on behalf of the bank, whether with the board of directors or the vice president. The inference is that the agreement was made with the vice president, otherwise the board would naturally have at the same time conferred the power on the vice president to transfer the notes. But it is plainly stated that the vice president acted without authority from the board, and the question was as to the *power of the vice president*.

Counsel, commenting on that case, says (page 38): "The vice president carried out the prior agreement made by the bank. As it is stated by the court that the bank itself made the agreement, and that it was carried out according to its terms, of course it would be presumed that the officer who executed it had authority to do so." If this were true, the whole discussion of the case would appear nonsensical; because, if the agreement was made by the bank and carried out in accordance with that agreement, why stop to discuss the power of the officer who executed a valid agreement? Here again, the position of counsel forces him into an inconsistent argument. He contends that Denney, the cashier, was the only officer authorized to indorse the name of the bank. He admits (page 19) that other notes had previously been regularly discounted. He does not dispute that the bank was liable as indorser of the notes of the

Dickinson Hardware Company, which were transmitted by Allis at the same time the notes in controversy were forwarded. The fact that the Little Rock Bank, through its cashier, made the agreement with the New York Bank for the rediscount cannot be denied (Tr., pp. 25, 26). Then we have Allis as president, undertaking to carry out a previous agreement of the bank, with the knowledge of Denney, in which he perpetuates a fraud, and counsel says we had no right to assume that he had any such authority. His argument simply amounts to this, that as the vice president in the People's Bank case carried out the previous agreement, his authority will be presumed, but as Allis in carrying out the agreement in this case perpetuated a fraud no authority can be presumed in him, and the New York Bank must stand the loss. We are unable to see any difference in principle in the two cases. Nor can we see any difference in principle if Denney had sent or indorsed the notes instead of Allis. Counsel ignores the well established principle uniformly adhered to by this court, and especially in the cases of *People's Bank v. Manufacturers National Bank, supra*, and *Merchants Bank v. State Bank*, 10 Wall., 604, that "where one of two innocent parties must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences," or as said in *Merchants Bank v. State Bank, supra*: "Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly."

Again, while counsel argues learnedly that Allis had no power beyond that of presiding over the board of directors,



he does not question the power exercised by Allis to direct an amount equal to the proceeds of the notes in controversy to be placed to his credit on the books of the Little Rock Bank (p. 63). Now as between the power to indorse for the purpose of rediscounting and the power to cause the funds of the bank to be transferred to his own credit, we submit the latter is greater and more dangerous. Objections may very properly be urged against the later exercise of power by any officer as a dealing with the funds of the bank in his own interest, which is prohibited by principles of equity and public policy. But there is no reason why the president—the superior officer—of a bank should exercise less authority in the matter of rediscounts or indorsements of paper than the cashier. Every person who knows anything about the business of banking knows that it is impossible for the cashier always to be on hand for the purpose of making indorsements and signing checks and other documents. He is necessarily absent at times, and it frequently becomes necessary for the president to attend to these matters, insomuch that in large banking institutions it becomes a matter of daily occurrence. The reasoning of the court of appeals (79 Fed. Rep., 298, 299) in this case seems to us unanswerable.

The cases relied on by counsel to support the proposition that the president has no inherent or implied power, are, as a rule, where the board of directors are specifically vested with full control and the president had taken no active part in the management of the business, as in the case of *City Electric Street Railway v. First National Bank*, 62 Ark., 33; S. C., 34 S. W. R., 89, where it was held that the statute expressly

vested the power to manage the business of the corporation in the board of directors, and it was shown that the secretary "and president had never indulged in a course of dealing between the corporation and third parties, so as to lead strangers to believe that they had power to issue negotiable paper in the name of the company," and the court in that case felt called upon in support of its opinion to remark that no usage could exist or be set up against the corporation in that case, because "the incorporation of electric street railways in the State of Arkansas is of comparatively recent date, and such corporations do not exist to any general extent throughout the State."

But the opinion in that case clearly draws the line which distinguishes that character of cases from the one at bar. It says:

"It must be remembered that the answer in this case denies *in toto* the authority of the president and secretary to issue negotiable paper. Hence, this case bears no analogy to that line of cases where the authority exists for some purposes, but is exercised for different purposes than that for which it was conferred. *Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued.*"

In *Putnam v. U. S.*, 162 U. S., 687, 713, cited by counsel, while the court holds that the president of a national bank *virtute officii* has not necessarily the power to draw checks against the account kept with another bank by the bank of which he is president, as against the power conferred by the statute on the board of directors to define the powers of the president, it does not hold that in the absence of any action by the board defining the powers of president, he may not draw checks, but says: "*True it is, that by a course of dealing with*

*a particular person, the power of an officer to perform a particular act may be implied when such power is not inconsistent with law."* Citing *Merchants Nat. Bank v. State Nat. Bank*, 10 Wall., 604.

The case of *Mussey v. Eagle Bank*, 9 Met., 306, 314, cited by counsel, stands alone in Massachusetts. It has not been followed by any other court, and is in conflict with the ruling of this court.

*Merchants Bank v. State Bank*, 10 Wall., 604.

*Coke v. State Nat. Bank of Boston*, 52 N. Y., 97,  
117.

## V.

**The New York Bank had the right under the evidence to assume that the notes were owned by the Little Rock Bank and were being negotiated by Allis as president, on its behalf, and that he had authority so to do.**

This is, to some extent, a concrete statement of the propositions already discussed, as applied to the facts in this case.

We submit, that no bank or business man of the most prudent habits would have exacted any other evidence of authority than that disclosed by the evidence in this case. But it is contended by counsel that the banks generally—and the New York Bank in particular—have not understood their business, and that a showing of special authority in Allis in this case should have been required. Suppose special authority had been required, what would it have amounted to. If Denney, who was the proper person, as cashier, to certify to any

resolution conferring authority, had been called on he could and would easily have furnished a copy of what purported to be a resolution. What protection would that have been more than that which will be given by the courts on account of his conduct, as disclosed by the evidence in this case? Nor would it have given any more protection to the Little Rock Bank, unless it held that the bank rediscounting paper for another bank must have an agent present at the meeting of the board of directors able to testify thereafter to what occurred. To apply the rule contended for by counsel in this case to the facts here disclosed by the record would be not only to overthrow a long line of decisions as to banking business, but to shake to their foundation principles heretofore considered settled beyond debate, in the law of corporations and agency.

In the leading case in England of *Royal British Bank v. Turquand*, 6 E. & B., 327 (Exchequer Chamber; reported below in 5 E. & B., 248), the question was raised as to the indebtedness of a corporation upon a loan made by its board of directors, whose authority to borrow depended upon the passage of a resolution at a general meeting of the company. The Exchequer Chamber, through Jervis, C. J., said (page 332):

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

It will be remembered that the deed of settlement of an English corporation is equivalent to the charter of an American corporation—an instrument filed in a public office so as to be accessible to the world at large. The information given there by the statute and deed of settlement as to the powers of a corporation and the limitations thereon, is that which is given with reference to a national bank by the statutes of the United States, and the articles of association which are filed with the Comptroller of the Currency. But as these articles are required, and can be expected to contain only the matters specified in Revised Statutes, section 5134, really the only source of information as to powers and limitations to be examined by one dealing with a national bank is the statute book. The effect of the decision just cited is that where the directors of a bank are exercising powers conferred by statute or charter only upon condition of previous authorization by the body of stockholders, one dealing with the directors may rightfully assume that the stockholders have given the necessary authorization; he is not required to demand an inspection of the minutes of the stockholders' meetings, or a certified copy of their action. It comes within the apparent scope of authority of the directors to rediscount notes; if the rediscount effected by them is beyond the actual scope of their authority, the loss must fall upon those who put them in office and enabled them to deceive the outside world. The rule thus applied to the actions of the directors is equally applicable to the actions of all other officers of the corporation. In short, if rediscounting paper be within the power of the corporation, and if the officer effecting a rediscount be the one through

whom, in the proper course of business, the transaction should be had, then the party taking the paper need not seek proof of special authorization. It is only an application of the general principle in the law of agency that knowledge of limitations upon the powers of a general agent must be forced upon, and not sought by, one who deals with him. The latest English case upon the subject is *Biggerstaff v. Rowatt's Wharf, Limited*, and *Howard v. Same* (1896), 2 Ch., 93. The decision was by Lords Justice Lindley, Lopes, and Kay in the court of appeals, and its importance and applicability to the case at bar justify us in stating it somewhat in detail. The defendant company was a corporation conducting a wharf. Its articles authorized the directors to appoint a managing director, and to confer upon him such of the powers of the board as they saw fit, other than the drawing, accepting or indorsing bills of exchange or promissory notes. Mr. Davy had been recognized and was acting as managing director, but there was nothing upon the directors' minute-book to show either his appointment or what powers were conferred upon him. At the time of the transactions in question the board consisted of three members. On October 20, 1894, Harvey, Brand & Co. discovered that the defendant company had misappropriated sundry barrels of which it was warehouseman. On October 22, 1894, a meeting occurred between Harvey, Brand & Co. and the three directors of the defendant, at which the former threatened criminal proceedings, and demanded the transfer to them of sundry securities held by the company. The meeting was postponed to the next day, when one of the directors was absent; and representation being made that the

company had no money to pay wages, and must close the wharf unless they could get an advance, Harvey, Brand & Co., having interests which would suffer if the wharf were closed, agreed to advance the money for wages, upon getting security for the advance and for the moneys due them on the prior transactions. The managing director then gave them the security desired. On October 30, 1894, the defendant company went into the hands of a receiver; and at that time Harvey, Brand & Co. were indebted to it for storage. The cause is reported upon their claim to set off the moneys due them for the advance and the preceding misappropriation against the claim for storage, and to be paid moneys which had been collected by the receiver on claims hypothecated to them. Upon this subject the members of the court spoke as follows:

Lindley, L. J. (p. 102):

"It is said that the company is not bound by those orders (the assignments to Harvey, Brand & Co.), because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors, except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are, in my opinion, valid."



Lopes, L. J. (page 103), after discussing some other questions, says:

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was managing director and acted as such, and, according to the articles, the directors could have given him the power which he purported to exercise. There is an absence of evidence that they have done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless (1) their employment was altogether beyond the powers of the directors; or unless (2) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point: In *Smith v. Hull Glass Co.*, 8 C. B., 668, 11 C. B., 897, it was held that a company registered under 7 and 8 Vict., c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities.'

"Every word of that applies here. It cannot be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bona fide*, or that they had not a right to assume that Mr. Davy was duly appointed."

Kay, L. J., said (page 106):



"Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing *ultra vires* of a managing director; and it would be extraordinary if a person dealing *bona fide* with the managing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly. Mr. Cozens-Hardy then contends that Harvey, Brand & Co. were not dealing with Mr. Davy as managing director; that they were dealing with the whole body of the directors, with whom they had a meeting on October 22, at which nothing was concluded, and then next day a meeting was held at which a quorum of directors was not present. This, he contends, shows that it was not intended that anything should be done but by the body of directors. It seems to me that on the 23d it was considered that the arrangement had been virtually come to on the 22d, and no discussion seems to have taken place about the terms; the matter seems to have been treated as settled. The letters of hypothecation were signed by the managing director as such; and Harvey, Brand & Co. had a right to assume that he had authority to sign them. There was, therefore, a complete hypothecation."

The principles underlying the decision just quoted have been repeatedly affirmed by this court. Upon them rest the long line of decisions as to the effect of recitals in city and county bonds, which are so familiar that it will be necessary only to refer to the subject generally, and specifically to the case of *Moran v. Commissioners of Miami County*, 2 Black, 722, where (page 724) the opinion in *Royal British Bank v. Turquand*, 6 E. & B., 327, was quoted at length and approved. Upon this reasoning rests the decision in *Merchants Bank v. State Bank*, 10 Wall., 604, where the court, speaking through

Mr. Justice Swayne, in words which, with reference to the powers ordinarily exercised by cashiers and vice presidents of banks as shown by the present record, are fully applicable to the case at bar, said (page 644):

“Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

“If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

“The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court.

“Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such, he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

“Those who created the trust appointed the trustee and clothed him with the powers that enabled him to mislead. If there were any misleading, ought to suffer rather than the other party.

“Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants Bank, and the bank, under the circumstances, had a right to believe him.”

The case of *Barnes v. Ontario Bank*, 19 N. Y., 152, is of acknowledged authority, and was cited with approval in *Mer-*

chants Bank v. State Bank, 10 Wall., 650: There the cashier of the defendant bank, without the authority or knowledge of its board of directors or other officers, had procured discount of its certificate of deposit issued without any deposit having in fact been made. The proceeds of the discount were placed to its credit with its New York correspondent, but no entry of any kind relating to the transaction appeared upon the books of the defendant bank. The court held the bank liable upon the certificate, and in the principal opinion it was said (page 156):

"The first questions presented are, whether the bank had power to borrow the money, and whether the cashier was a proper agent to execute that power without any special delegation of authority thus to act. That the power to borrow existed was determined by this court, upon the fullest examination, in the case of *Curtis v. Leavitt*, 15 N. Y., 9. That the cashier, in virtue of his general employment, could exercise the power, was not denied upon the argument, and the proposition does not admit of a reasonable doubt."

The counsel who argued the case were Francis Kernan for the bank, and Nicholas Hill for the certificate holder—two of the most prominent lawyers of that day in the State of New York. The principle there decided was again affirmed by that court in *Coats v. Donnell*, 94 N. Y., 168, where it was said (page 176):

"The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence."

In *Donnell v. The Lewis County Savings Bank*, 80 Mo., 165, the plaintiffs were the same New York banking firm as in the previous case, and were again attempting to sustain a loan which they had made to a Western bank upon an obligation executed in its name by one of its officers without authority expressly delegated by its board of directors, viz, a note signed by the cashier individually, payable to the order of the bank and indorsed by the bank, through its president, which the plaintiffs had discounted, knowing it to be what bankers call "made paper," that is, paper without real consideration as between the parties, and made up merely to evidence the loan. The authority of the defendant bank to borrow money, and that of its officers to bind it upon such paper, were challenged and denied by the court below. This judgment was reversed, and the court sustained the authority of any corporation, having general banking powers, to borrow, and also the apparent scope of the authority of the cashier to execute such power, and that one dealing with him need not prove either special delegation or subsequent ratification. The opinion merely states the propositions with the conclusions reached, and refers for a fuller discussion to the case of *Ringling v. Kohn*, 6 Mo. App., 332, where similar questions were presented, saying (page 171):

"These positions are well supported by the numerous authorities cited and relied on by the court of appeals in its well considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that."

The facts in the latter case were, in brief, as follows: The cashier of the People's Savings Institution, a corporation hav-

ing general banking powers, borrowing from Kohn money in its name upon its demand note signed by him as cashier, pledging as security government bonds belonging to Ringling, which the bank held on special deposit; the cashier then absconded, being a defaulter in an amount much larger than the loan. The suit was by Ringling against the pledgee to recover his bonds. On the first trial Ringling recovered judgment, which was reversed upon grounds not material to the present discussion (4 Mo. App., 59). On the second trial Ringling again recovered judgment, the court below holding that the act of the cashier in borrowing the money did not bind the bank without proof of special delegation or subsequent ratification. In reviewing the judgment the court of appeals, after affirming the power of the bank to borrow money as being "a necessary and inherent privilege, inseparable from the exercise of its banking functions," and referring with approval to the decisions in *City Bank v. Perkins*, 4 Bosworth, 420, and *Barnes v. Ontario Bank*, 19 N. Y., 56, cited above, sustains the conclusions there reached, and sums up the matter in the following words:

"We find no judicial authority for the proposition that when a cashier borrows for his bank, the lender will be imperiled unless a special power has been given."

We refer to the following decisions additional to these, and those already cited under other heads, as confirming the propositions heretofore made:

*Smith v. Hull Glass Co.*, 11 C. B., 896.

*Mahony v. E. Holyford Mining Co.*, L. R. 7 H. L.,  
869.

County of Gloucester Bank *v.* Rudry Merthyr, etc.,  
Colliery Co. (1895), 1 Ch., 629; 12 Rep., 182.

Barwick *v.* English Joint Stock Bank, L. R., 2  
Exch., 259, 266.

Swire *v.* Francis, L. R., 3 App. Cas., 106.

Montaignac *v.* Shitta, L. R., 15 App. Cas., 357.

*In re* Hampshire Land Co. (1896), 2 Ch., 743.

Creswell *v.* Lanahan, 101 U. S., 347.

Bank of Lakin *v.* National Bank of Commerce, 57  
Kan., —; 45 Pac., 587.

Grommes *v.* Sullivan, 81 Fed. Rep., 45.

Bradley *v.* Ballard, 55 Ill., 413, 420.

Bank *v.* Griffin (Ill.), 48 N. E., 154.

Gilpeke *v.* Dubuque, 1 Wall., 175.

Galveston R. R. Co. *v.* Cowdry, 11 Wall., 459.

Merchants Nat. Bank *v.* Citizens Gaslight Co., 34  
N. E., 1083.

Monument National Bank *v.* Globe Works, 101  
Mass., 57.

Miller *v.* American Mutual Accident Ins. Co., 92  
Tenn., 167; 20 L. R. A., 765.

N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y., 64.

In reference to negotiable paper the rule is more liberal in favor of the power, and the courts go much further in the protection of innocent holders of the paper than in the case of ordinary contracts.

Merchants Bank *v.* State Bank, 10 Wall., 604, from  
which quotation has been made.

In *National Bank of Republic v. Young*, 41 N. J. Eq.,  
531, it was held that:

"When a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

In the case of *American Exchange National Bank v. Oregon Pottery Co.*, 55 Fed. Rep., 265, the second ground of defense to the notes sued upon was "that the president and secretary of the defendant had no authority from the defendant, either by by-law or resolution, to execute the note, and that the defendant received no benefit therefrom, and did not ratify the same."

But the court said:

"The demurrer to the second defense, however, is well taken. The payee or indorsee of a negotiable promissory note, signed by the officers of a corporation as the note of a corporation, is not required to ascertain whether the officers have authority to make the note. A corporation framed under the general incorporation laws, for the purpose of conducting business, has, so far as the law is concerned, the same power that an individual has to contract debts whenever necessary or convenient in furtherance of its legitimate objects. It may borrow money to pay its debts. It may execute notes, bonds, and bills of exchange. The power to sign such paper may be conferred upon any officer. If the president and secretary sign, their authority is inferred from their official relation.

"All persons dealing with them have the right to assume that there is no restriction of that authority. They also have the right to assume, unless they have actual notice to the contrary, that a note so signed is made in the regular course of the business of the corporation. To hold otherwise would destroy the negotiability of all notes made by corporations. \* \* \* In the absence of an allegation that the president and secretary of this corporation were deprived of power to make this promissory note, and that that fact was known to the payee of the note and the plaintiff before they became holders of the paper, the demurrer to this defense must be sustained."

1 Morawetz on Corporations, sec. 538, and note 1;

2 ib., sec. 602.

1 Daniels on Neg. Instruments, secs. 381, 386, 389,  
*et seq.*

Taylor on Private Corporations, sec. 204.

People's Bank v. Manufacturers Nat. Bank, 101  
U. S., 181.

Smith v. County of Sac, 11 Wall., 160.

City of Lexington v. Butler, 14 Wall., 296.

Ellsworth v. R. R. Co., 98 N. Y., 553, and authorities *supra*.

## VI.

**As a matter of fact Allis did have power to  
rediscount and indorse for his bank.**

Even if it be admitted that Allis, as president, had no inherent power it does not follow that record authority was necessary to enable him to rediscount. Authority might have been conferred by the by-laws, by resolution of the board of directors, or by the assumption of those powers with knowledge and acquiescence of the board of directors.

Cox v. Robinson, 70 Fed. Rep., 762.

Bank v. Dandridge, 12 Wheat., 70.

4 Thompson on Corp., sec. 4881.

Bank v. Graham, 100 U. S., 699.

Bank v. Atkinson, 55 Fed. Rep., 465.

Burton, Receiver, v. Busby, Receiver, 2 National  
Bank Cases, 134.

Bell v. Hanover Nat. Bank, 57 Fed. Rep., 821.

Simons v. Fisher, 55 Fed. Rep., 905.

At the risk of repetition, we desire here to refer in detail to the evidence which shows beyond question that Allis, with-



out objection from the board, if not with their positive assent, assumed and for a long time exercised the power to say where and what amount of rediscounts should be made, and the cashier and assistant cashier simply acted under his instructions. C. T. Walker, the former cashier, testified (Tr., pp. 48-50) as follows:

"Q. What was the custom of that bank at the time as to rediscounts?

"A. Well, these matters were usually referred to the president of the bank. *He directed me.* \* \* \*

"Q. Then, whenever you needed rediscounts, you would refer that to the president?

"A. Yes, sir.

"Q. State now what he would do?

"A. He generally directed what amount and where to send them.

"Q. Then I understand he had control of the rediscounts?

"A. Yes, sir; they were referred to him.

"Q. Were these matters ever referred to the board of directors?

"A. I cannot say whether he referred them to the board or not. \* \* \*"

#### CROSS-EXAMINATION:

"Q. These matters were referred back to the cashier in the end for the purpose of procuring the discounts? When discounts were determined upon, the cashier was the man who transacted the business, was he not?

"A. Well, most of that was done with Mr. Denney, the assistant cashier. I do not remember ever sending off a batch of them.

"Q. They were not done by the president (Tr., p. 70)?

"A. Well, before they were made at all.

"Q. Merely asked his advice in regard to it?

"A. Yes, sir; generally asked his *instructions.* \* \* \*"

**REDIRECT:**

“Q. He did have the authority to direct the amount to be sent and when to be sent, and the cashier or assistant cashier acted under his instructions?

“A. Yes, sir. Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send it to.”

E. J. Butler, one of the directors (Tr., pp. 53, 54), testified that Allis never asked the board for power to make rediscounts. He knew rediscounts were being made, and signed reports to the comptroller showing rediscounts, but did not know the extent or amount of rediscounts made.

N. Kupferle, one of the directors and vice president, testified (Tr., pp. 55, 56), that nothing was ever said before the board about the power of Allis to rediscount; that the question was never brought before the board at all while Allis was president about rediscounting paper; that Allis acted as general manager of the bank and had general control; that he directed most of the business or all the business while he was there; that the cashier acted under his control, as a rule. Witness was about there and knew the power he exercised, and he used his power, of course. He could only recall that Allis or Denney ever called on the board for power to rediscount paper but once, when Allis, in the fall of 1892, “requested that the bank should borrow more money.” Witness knew that the bank had been rediscounting paper long before, and no authority had been asked from the board, notwithstanding he knew “that they were borrowing money and rediscounting paper continually.”

C. T. Abeles, a director, testified (Tr., pp. 58, 59) that

the authority of anyone to rediscount was never mentioned before the board, that he remembered while on the board. Knew that the bank was rediscounting paper, and that somebody was transacting that part of the business, but never inquired of Allis or Denney who was doing the rediscounting, or where they were doing it.

M. M. Cohn, one of the directors, testified (Tr., p. 82) that the question was never brought before the board as to who had authority to rediscount. The question never presented itself to his mind. Knew from the statements that rediscounts were being made. Did not know by whom, and did not stop to inquire.

Thus, it will be seen that the board did not attempt to exercise any supervisory control whatever over the matter of rediscounts and that that was left entirely to Allis and the cashier, if not to Allis alone. The fact that Allis was in control and directed the affairs of the bank, which was known to the directors, necessarily shows that they must have understood that he had charge of the rediscounts also. They could easily have known who was doing it, and they are chargeable with notice that Allis was exercising this power. In fact, the evidence of Kupferle shows that he must have known it. Hence, we have the power of Allis clearly established by the acquiescence and public holding out on the part of the board. In addition to that we have the course of dealing between the two banks from which the plaintiff had a right to presume that Allis had authority to make the rediscounts. But counsel says we did not establish the fact that Allis had ever indorsed the name of the bank upon paper before this. This was not neces-

sary, even if we admit that counsel is correct, because, when we establish his power to negotiate or direct the rediscounts to be made, as in this case, the power to indorse is necessarily implied. It would seem folly to allow full authority to direct and control the matter of rediscounts, and at the same time say he should not have power himself to rediscount for the bank, and the same is true in reference to the power to negotiate and indorse the paper.

In *Merchants Bank v. Central Bank*, 1 Ga., 418; S. C., 44 Am. Dec., 665, the court said:

“The power to discount confers the power to indorse, whenever an agent is empowered to do a particular thing he is also empowered to use the means necessary to accomplish it. The means are included in the power.”

Story on Agency, sec. 77 (8th Ed., sec. 59).

Bailey on Bills (5th Ed.), Ch. 27.

*Rumer v. Bank of Columbia*, 9 Wheat., 584.

*Cox v. Robinson*, 70 Fed. Rep., 762.

In *Bank of Genessee v. Patchin Bank*, 13 N. Y., 309, Denio, J., said:

“The contract of indorsement is incident to the negotiation of negotiable paper and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes.”

But no other conclusion can be arrived at from the testimony in the case than that Allis did indorse the notes in behalf of the bank. Aside from the fact that he conducted, practically, all the correspondence which inclosed notes for rediscount, and must have indorsed many, if not all of them, and the fact that no question is made as to the validity of his action in reference to the two notes of the Dickinson Hardware Com-

pany, inclosed at the same time with the notes in controversy, and must have been indorsed by him, the signatures of the officers of the bank were inclosed in the first letter written by Allis (Tr., p. 17), and when his resignation was accepted and Kupferle elected in his stead the signatures of the officers were again sent to the New York Bank, and the signature of Kupferle substituted for that of Allis (Exhibits 57, and 58, Tr., p. 37). These signatures were intended for all purposes for which the name of the bank was to be signed. There can be no more difference in signing a draft or indorsing a bill of exchange than indorsing a note for rediscount. If it were material to show that Allis was authorized to indorse for the bank and did so, there can be no doubt from this evidence that the fact is fully established.

Crain v. First National Bank, 114 Ill., 516.

## VII.

**There is nothing in the form of the notes, or in the facts to charge the New York Bank with notice of the want of authority or fraud of Allis.**

The case of West St. Louis Savings Bank v. Parmelee and the Shawnee County Bank, 95 U. S., 557, relied on by counsel, we submit, bears no analogy to this. There the cashier of the Shawnee Bank executed his individual note payable to the plaintiff bank, and indorsed the name of the Shawnee Bank upon it by himself as cashier. The consideration of the note was a loan to the cashier *individually*, of which the plaintiff at the time of taking the note had notice. The nego-

tiations were all between the plaintiff bank and the cashier of the defendant in his *individual* capacity, and it was not claimed that he at any time pretended that his bank was in anyway interested in the matter, other than merely an accommodation indorser.

The court said: "There is not a single circumstance tending in any manner to prove that the transaction was looked upon as a rediscount for the Shawnee Bank, except the entries in the books of the St. Louis Bank, and these are far from sufficient to overcome the positive testimony as to what the agreement actually was." The same may be said of the other cases cited.

In the case at bar there is no pretense that the New York Bank dealt with Allis in his individual capacity, or knew that he was individually interested. The proof is unquestioned that it dealt with him solely on behalf of the Little Rock Bank (Tr., p. 13). The only fact upon which the learned counsel bases his argument as to this point is that three of the notes were payable to Brown and Allis, and they all bore his personal indorsement. If we consider the two cases simply upon the face of the notes, without regard to any extraneous facts relating to knowledge of the individual interest of the officer of the bank using the bank's indorsement, still there is no analogy between them. The indorsement of the Shawnee Bank was made upon a note of its cashier payable directly to the West St. Louis Savings Bank.

In the very nature of the case the West St. Louis Savings Bank must have known that the Shawnee Bank was a mere accommodation indorser. But in the case at bar Allis's in-

dorsement upon the notes could be notice of nothing more than that Allis had at one time owned the notes and discounted the same at the First National Bank; and as to the McCarthy & Joyce notes it need not necessarily imply anything more than an accommodation indorsement. Neither would imply that he was acting in any way for his personal benefit or that he had any interest in the proceeds of the notes.

On the face of the notes three of them appear to have passed from Brown and Allis to the bank, and two of them from Allis to the bank, or, if we treat Allis as an accommodation indorser, from James Joyce to the bank. *The bank was the ostensible owner of the paper. The notes were discounted for account and placed to the credit of the bank. Everything which Allis did, to all appearances, was for and in the interest of the bank and not for himself.*

As said by the court of appeals (64 Fed., 989): "Such being the undisputed facts of the case, in deciding as to what information was given to the plaintiff by the form of the notes, we must apply the well known rule that a person purchasing negotiable paper is entitled to assume, in the absence of knowledge to the contrary, that the actual relation of every party thereto and his interest therein is what it seems to be from the face of the paper. In the present case the notes, when presented to the plaintiff for discount, were so drawn and indorsed as to create a presumption on which the plaintiff was entitled to act, that they had been indorsed by Allis to the Little Rock Bank, and that the bank was the holder for value. And this presumption created by the notes themselves, was confirmed

by the correspondence between the two banks in relation to the proposed discount to which we have heretofore adverted."

The cases cited by counsel are all clearly distinguishable from this. The distinction is satisfactorily indicated in the case of *Bank v. Hume*, 4 Mackay, 103, where the action was on the following note:

"\$1,200.

"Washington, D. C., September 27, 1881.

"Thirty days after date I promise to pay to the order of Frank Hume \$1,200, value received, with 8 per cent interest until paid, payable at Second National Bank.

Indorsed:

THOMAS L. HUME.

Frank Hume.

Hume, Cleary & Co."

The court said:

"In the further progress of the cause, there was evidence offered on the part of the defendants, and admitted subject to exception for the purpose of showing that the note had never been the note of the partnership or of the first indorser, and that no value had been received for it by either of the parties subsequent to the drawer, and further, that the note was discounted by the drawer at the bank for his own benefit, and was treated throughout by the bank and the drawer (although the drawer was one of the parties composing the firm), as his own property.

"It was proper upon that form of proof to submit the whole case to the jury to determine, as a matter of fact, whether the holder of the paper, at the time he discounted it on behalf of the drawer, was dealing with the drawer in his individual capacity or was dealing with him as a member of the firm for the benefit of the firm. Occupying the double character of drawer of the note and also one of the members of the firm indorsing the note, it would have been competent for him, notwithstanding the unusual form of the note, to have treated it as a note offered for discount by him in his character as a member of the firm for the benefit of the firm; and if he



*had professed to be dealing with the discounting bank in his character as a member of the firm for the benefit of the firm, the form of the paper when it stands thus in the peculiar dual relation of a partner so dealing, would not have been as in the case in the 95th U. S.—the cashier of the Shawnee Bank dealing with the paper of the bank—satisfactory proof that it was only accommodation paper on the part of the bank who was put there as an indorser, and that the party was therefore charged legally with knowledge and notice of the infirmity of it and bound to see whether the accommodation indorsement was for the benefit of the party offering it and duly authorized; but, on account of his dual character, he would still have had the right to deal with it as a partnership paper if he had so dealt with it."*

Also in *Central Trust Company v. Cook County National Bank*, 15 Fed., 885, "where a party discounts a note given by the president of a bank, with the indorsement of the bank thereon, supposing that he is dealing with and advancing the money to the bank, and not the president personally, the bank will be held liable for the payment of such note." Distinguishing *Claffin v. Farmers Loan and Trust Company*, 25 N. Y., 293, relied on by counsel.

*Freeman's Nat. Bank v. Savery*, 127 Mass., 78.

*Kaiser v. First Nat. Bank*, 78 Fed., 281.

There is nothing in the law or in the usage of banks so far as we have been able to ascertain which prohibits a bank from discounting the paper of one of its officers, and if there is, this fact would only be calculated to arouse a suspicion at most.

But something more than suspicious circumstances are required to put the purchaser of negotiable paper upon notice. Its free and untrammelled circulation is universally favored by the courts, and he who would successfully attack the title

of the indorsee for value before maturity, must bring to him the *knowledge of facts*, which would convict him of bad faith in securing the indorsement. Even gross negligence will not defeat his right of recovery.

The rights of the holder are to be determined by the simplest test of honesty and good faith; and not by a speculative issue as to diligence or negligence. He owes no duty of active inquiry.

This is the rule established and steadfastly adhered to by this court, and is supported by most if not all the State courts and in England.

In *Murray v. Lardner*, 2 Wall., 122, 123, the court said:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

In *Hotchkiss v. National Shoe and Leather Bank*, 21 Wall., 360, the court said:

"The law is well settled that a party who takes negotiable paper before due for valuable consideration, without knowledge of any defect of title, in good faith, can hold it against the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

In *Hopkins & Hammond v. Withrow*, 42 Ill. App., 584, held that:

"Suspicion of defect of title or the knowledge of circumstances which excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, will not defeat his title. *Bona fides* should be the decisive test of the holder's rights."

In *Wilson v. Dent*, 18 S. W., 622 (82 Tex.), the court said:

"The ordinary rule of constructive notice which applies to the purchase of property is not applicable in the case of negotiable instruments. As promotive of circulation, a liberal view is taken, which makes the *bona fides* of the transaction the test of the holder's right. He is entitled to recover upon it if he has come by it honestly."

"Before an indorsee's title to a negotiable note can be impeached on account of notice of fraud, he must have actual notice of the facts which impeach the validity of the paper, and such circumstances as would likely arouse suspicion or put a prudent man on inquiry will not suffice."

First Nat. Bank of *Cameron v. Stanley*, 46 Mo. App., 440.

In *Richardson v. Monroe* (Iowa), 52 N. W., 340, held that:

"It is error to instruct the jury to the effect that when the purchaser of a negotiable promissory note for value, before maturity, has such knowledge of infirmities in the note as would put a man of ordinary prudence on inquiry, he will be held to have notice of any defects that exist."

The court said:

"Such is certainly not the rule in this State. The early and present doctrine is that the right of a *bona fide* holder for value, in the usual course of business of negotiable paper, cannot be defeated by proof that he was negligent and omitted to make inquiries which common prudence would have dictated.' \* \* \* In *Pond v. Agricultural Works*, 50 Iowa, 600, it is said: 'To charge the holder

of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note. Indeed, gross negligence, it is said, is not sufficient, and that nothing but fraud is sufficient to destroy the character of the holder as one who acted in good faith.' ”

See also

*Kaiser v. First Nat. Bank*, 78 Fed., 281.

*Thompson v. Love*, 61 Ark., 81.

*Goodman v. Simonds*, 20 How., 343.

*Swift v. Smith*, 102 U. S., 442.

*King v. Doane*, 139 U. S., 166.

*Comstock v. Hannah*, 76 Ill., 530.

*Magee v. Badger*, 34 N. Y., 247.

*Belmont Branch Bank v. Hoyer*, 35 N. Y., 65.

*Seybil v. National Currency Bank*, 54 N. Y., 288.

The court of appeals, in passing upon this feature of the case, has well said (64 Fed., 990):

“In the suit at bar, the defendant bank itself offered the notes in suit for rediscount; the request for the discount was made by its president and cashier, each acting in an official capacity; the offer was accompanied with a satisfactory excuse for asking a rediscount—such an excuse as would naturally disarm suspicion. Moreover, the paper offered for rediscount appeared to have been regularly indorsed to the defendant bank; it was ostensibly in its possession, and the proceeds of the discount were passed to its credit, and were subsequently paid out on its checks. Under these circumstances, it cannot be said that the plaintiff acted in bad faith or that it was affected with notice that the Little Rock Bank was merely an accommodation indorser.”

VIII.

**The burden was upon the Little Rock Bank to show that the New York Bank took the notes with such knowledge of the fraud of Allis as amounts to bad faith on its part.**

We take it to be the settled doctrine of the Supreme Courts of the United States and of Arkansas, that when the defense of fraud or want of authority is interposed to a suit by one to whom a negotiable note has been transferred, and the fraud is proven, the holder is required to prove that the note was acquired before maturity, and for value, and the burden is then thrown upon the defendant to prove that the holder of the note had notice of the defect.

*Swift v. Tyson*, 16 Pet., 1.

*Goodman v. Simonds*, 20 How., 343.

*Carpenter v. Logan*, 16 Wall., 271.

*Murray v. Lardner*, 2 Wall., 110.

*Collins v. Gilbert*, 94 U. S., 753.

*King v. Doane*, 139 U. S., 166.

*Smith v. Sac County*, 11 Wall., 139.

*Press Co. v. City Bank of Hartford*, 58 Fed., 321.

*Taber v. Merchants Bank*, 48 Ark., 454.

Counsel argues that this rule has no application to this case, because, as he says, the New York Bank must first establish the authority of Allis.

But the rule contended for by counsel is applicable only to a case where the power cannot be exercised as some of the courts say, "under any circumstances," or as others would say,

"under ordinary circumstances" (81 Fed., 47), and where no presumptions arise from the position or acts of the agent. Even the extreme cases cited by counsel on the question of the authority of an officer recognize this, as in *Lamb v. Cecil*, 28 W. Va., 659, where the court, speaking of the power of the cashier to indorse for rediscount, said:

"It is a matter which does not come within the ordinary duties of the cashier, and is not one of his inherent powers, but inasmuch as it is a power which is exercised by him under some circumstances, a transfer of such bills and notes made by him in the usual course of business of the bank to a person who has no reason to doubt the propriety of the transfer or to question its good faith, will be *prima facie* valid and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had from the board of directors either an express or implied authority to make the transfer, and not because he had by virtue of his office inherent power to do so. *Hoyt v. Thompson*, 1 Seld., 320; *Hartford Bank v. Barry*, 17 Mass., 97; *Smith v. Lawson*, 18 W. Va., 212."

And as said by the court in *City Electric Street Railway Company v. First National Bank*, 62 Ark., 41:

"Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued."

*Grommes v. Sullivan*, 81 Fed. Rep., 45-47.

*Lanning v. Lockett*, 10 Fed. Rep., 451.

We have taken these quotations from the two extreme cases cited by counsel; others more liberal might be found. If these quotations correctly state the rule, then it devolved on the Little Rock Bank not only to show that the authority or apparent authority of Allis had been restricted, but that the

New York Bank had knowledge of that fact and that Allis was acting in fraud of his authority.

We submit, however, that even if the burden should be upon the New York Bank, it has fully met it by the proof.

## IX.

**The receiver is estopped to set up fraud or want of authority on the part of Allis.**

Nothing is better settled in law than that a corporation may be estopped by its conduct, or that of its officers, the same as an individual.

In *Merchants National Bank v. State National Bank*, 10 Wall., 604, the court said:

"Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. \* \* \* Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances. \* \* \* Estoppel *in pais* presupposes an error or fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune should not himself escape the consequences and cast the burden upon another. \* \* \* Smith was the cashier of the State Bank. As such he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. This misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics of the law of the case alike require this result. Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there was any misleading, ought to suffer rather than the other party."

This case is strongly analagous to the one at bar. The plaintiff bank did not approach the First National. That bank, through its cashier, requested plaintiff to make the discount. This request was acceded to in a letter addressed by plaintiff to Denney, the cashier of the First National. Allis, as president, forwarded the notes in a letter referring to the previous correspondence in reference to the same, and the plaintiff, in accordance with the usual custom, telegraphed the First National that the discount had been made, and also addressed to that bank a letter to the same effect, specifying particularly the notes discounted. But this is not all. Plaintiff at the same time returned one of the notes forwarded by Allis for correction, and Denney, the cashier, at once returned the same corrected in a letter, in which he not only failed to raise any objection to the validity of the transaction, but ratified it in that he says: "We charge your account with \$31,871.27, proceeds of \$32,500 discounts." If, as said by the court of appeals (64 Fed., 990), the letters of Denney and Allis asking for the discount, were accompanied with "such an excuse as would naturally disarm suspicion," what must be said of this last letter of Denney. If, as contended by counsel, Denney, as cashier, was the chief executive officer of the bank, it was his duty to notify plaintiff at once of any fraud or irregularity in the matter. And even if the plaintiff had not the right before this to assume that all was right, it had the unquestioned right after reception of this letter to assume that the regularity of the transaction was beyond question.

In the case of *Butler v. Cockrill*, 73 Fed. Rep., page 951, the court said:



"A corporation is bound to a careful adherence to truth in its dealings, as much as an individual. It cannot take advantage of its own wrong to benefit itself, and to defeat the just calculations of innocent third parties, who have acted in reliance upon its representations and conduct. It is governed by the well settled rule that 'One, who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former be permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial.' "

*Zabuski v. Cleveland and R. R. Co.*, 23 How., 469.

In the case of *Bank of United States v. Bank of Georgia*, 10 Wheat., 333, the Bank of Georgia having originally issued the bank notes in question in that case, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States as cash by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States and by them refused. Both the parties were equally innocent of the fraud, and it was not disputed that the Bank of the United States was holder *bona fide* for a valuable consideration.

*Held*, that the Bank of Georgia was estopped and could not recover against the Bank of the United States on account of the spurious notes.

In *Leather Manufacturers National Bank v. Morgan*, 117 U. S., 96, it was held:

"1. When a bank depositor sends his pass book to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto. If he fails so to do, he may be estopped from questioning the conclusiveness of the account. 2. If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent."

*Wing v. Commercial and Savings Bank*, 61 N. W., 1009.

*Ditty v. Dominion National Bank of Bristol, Va.*, 75 Fed., 769.

The conduct of Denney in this case was not merely negligent—he acted with positive knowledge of the facts. The defendant bank is liable for his conduct. It cannot plead innocence.

*Nevada Bank of San Francisco v. Portland National Bank*, 59 Fed., 338.

*Fisher v. U. S. National Bank*, 64 Fed., 710.

Aside from the positive knowledge which Denney had of all the transactions with the plaintiff, there is no dispute but that all the previous transactions and all the correspondence relating thereto, were of record in the Little Rock Bank, and with one exception the correspondence in reference to the transaction in question, was on file in that bank. Colonel Roots, in his letter to the New York Bank (Exhibit 70, Tr., p. 41), says he cannot find a copy of Allis's letter transmitting the notes on file; but it does not follow from this that a copy never was on file. However that may be, there is no question

but that the letter of the New York Bank in reference to the discount was on file, as well as the previous letters of Denney, and the one dated December 20, in answer to plaintiff's letter of December 16, and the correspondence as to all previous transactions. This correspondence all showed the true nature of the transaction. Moreover, the board of directors, according to the testimony of its members, had abandoned all supervisory control of rediscounts, and left it to the president and cashier, who had for a long time attended to it. The board cannot plead ignorance as to the manner in which this part of the business was carried on. It was their duty to know. They should, at least, have exercised due diligence to see that the officers to whom they intrusted the business of the bank attended to it properly. Besides the course of dealing, which had grown up and been in existence for several months, between the two banks, was an open book, of which the directors might easily have known, and of which they should have had knowledge.

In *Martin v. Webb*, 110 U. S., 7, 15, the court said:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of the business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In *First National Bank v. Fourth National Bank*, 56 Fed., 967, it was held, that:

"A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty it is to open and distribute mail matter, although he conceals such letters to hide certain irregularities in his office, and thereby prevents their coming into the hands of the other bank officers."

In *Ditty v. Dominion National Bank*, 75 Fed., 769, the president having embezzled funds of the bank on deposit with its reserve agent, replaced the same with money borrowed by him on the bank's note, without the directors' knowledge, and such money was thereafter drawn out to pay the bank's lawful debts. The court said:

"In our opinion, even if the president may not have had authority to effect the loan, yet when he, in order to conceal his previous embezzlements, deposited the sum to the credit of the bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman, as its president, had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion National Bank. We think the same principle applicable in this case which was applied in the case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass., 268; 17 N. E., 496. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the annual settlement of the company, he drew checks of the other, and deposited them to the credit of one company in bank. On subsequent investigation, the question was whether the company whose bank account had been swelled by the checks of the other, was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take it with the burden of his knowledge. So, in this case, the bank having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do

not see that the circumstances, in that case, that the treasurer stole the money, and in this, that the president obtained it by false representation that he was authorized to borrow it for the bank, makes any reasonable distinction between the two cases."

4 Thompson on Corp., secs. 4608, 5210, 5224.

Scripture v. Francetown, etc., Co., 50 N. H., 571.

Bell v. Hanover Nat. Bank, 57 Fed., 821.

Jones, McDowell & Co. v. Ark. Mech. & Agrl. Co.,  
38 Ark., 17.

Lane v. Bank, 9 Heisk. (Tenn.), 437.

If, as contended by defendant, Denney was the chief executive officer of the bank, his action in soliciting the discount of plaintiff which was consummated through Allis, and his approval thereof after being notified of it, were such that the plaintiff bank had a right to rely upon as showing the transaction to be correct. According to the testimony of the members of the board, if Allis had no authority to make the rediscounts, Denney had, because the power was conceded by the board to one or both of them, and if conceded to Denney, he had all the powers of the board in that respect, and was the proper person for the plaintiff to apply to for the confirmation or verification of the authority of Allis, in fact by his letters before and after the discount, Denney was a party to the transaction. Had the plaintiff applied to him to know what authority Allis had to transmit the notes and indorse them, it could not have had from him a more positive affirmation of Allis's authority than in his letter and conduct after the receipt of plaintiff's telegram and letter notifying the Little Rock Bank of the rediscounts.

*Wilson v. Metropolitan Ry. Co.*, 24 N. E., 384; S. C., 120 N. Y., 145.

*The Distilled Spirits*, 11 Wall., 356.

If the board of directors knew nothing of the matter it was because they had failed to perform their official duty and intrusted it to the cashier or president. In *Fishkell Savings Institution v. National Bank of Fishkell*, 80 N. Y., 162; S. C., Am. Rep., 595, the cashier of the national bank was also treasurer of the savings bank. He took bonds belonging to the savings bank, and as cashier and manager of the national bank, pledged them as security for advance to the national bank, and they were afterwards sold by the pledgees and their proceeds were credited to the national bank. Held, that the national bank was liable although the directors of the national bank were ignorant of the transaction; the court said:

"I do not think the case for the plaintiff would be any stronger if the actual concurrence of the directors in the cashier's fraud was established. If they were ignorant of it, it is because they omitted the performance of official duty, and so were not less bound than if the ignorance was intentional, that they or the bank they represent might profit by it. This the law will not tolerate."

In *First National Bank of Kalamazoo v. Stone*, 64 N. W., 488, the court said:

"Courts will presume that the directors knew what by due diligence they might have known."

*The proceeds of the rediscounts went to the benefit of the Little Rock Bank.*

It will be remembered that the proceeds of the notes were credited to the account of the Little Rock Bank with the New York Bank, and were checked out of that account by its

authorized checks, and so went to pay its valid liabilities. Every dollar of the proceeds of the notes went to the use of the Little Rock Bank, and if the proceeds of the notes had not been credited, the same checks having been presented, the Little Rock Bank would have been indebted to the New York Bank in the same amount by way of overdraft. No dispute or controversy can arise upon the record with reference to these facts; the only question is whether their legal effect is in any way altered by the fact that on the next day after the proceeds of the notes had been credited in New York, Allis took credit in Little Rock for the same amount. The New York Bank was in absolute ignorance of what Allis had done in Little Rock, and never had any means of knowledge until the facts were developed after the Little Rock Bank failed. This was not true as to the Little Rock Bank and its directors; for knowledge of what Allis had done (as we have seen) was actually within the possession of Denney, the cashier, and also of the bookkeeper, and the information given by the previous correspondence of the two banks and by the telegram (Exhibit 24, Tr., p. 27), and the letter (Exhibit 23, Tr., p. 26) of the New York Bank giving notice that the notes had been rediscounted for the Little Rock Bank, and the charge tickets made by Allis (Tr., p. 63) against the proceeds of the notes, remained on file always accessible. Not only was there negligence and positive wrong on the part of Denney in not raising objection to the transaction instead of affirming it, as we have seen, but the bookkeeper, who testifies so expertly, should have raised objection to the credits being entered in Allis's

favor on the books of the Little Rock Bank. It is of course not an unusual thing for funds to be transferred and credits to be given by book entries, but such transactions should be made only upon proper information and authority. And it is a most remarkable thing that such a thing should be done on the order merely of him who receives it. When the credit was entered by the New York Bank, the proceeds of the notes became the property of the Little Rock Bank.

S. 435-444      *Anderson v. Kissman*, 35 Fed. Rep., 699, 705.

It may be the duty of a clerk, from a banker's point of view, to make every entry which his superior directs him to make; in other words, he may be a mere machine. But we should dislike to be upon the bond of a clerk who took that view of his duties. Assuming, however, that in the interest of due subordination, it is proper for a clerk to make entries directed by his superior in the interest of that superior, and without proof other than his word, it certainly is further his duty to report what he has done to some other superior. The proposition is, we think, self-evident. As between the New York Bank and the Little Rock Bank, the knowledge of the bookkeeper and of Denney, was notice to the Little Rock Bank of what Allis had done.

*First National Bank v. Fourth National Bank*, 56 Fed. Rep., 967.

*Armstrong v. Chemical National Bank*, 83 Fed. Rep., 556.

We have heretofore called attention to the inconsistency of the position taken by counsel in that while arguing that Allis, as president, only had the power of a presiding officer



over the board of directors, and did not even have the power to indorse for the bank, he does not call in question his power to cause this credit to be entered in his own behalf. We only wish at this place to emphasize the fact as showing what power Allis did exercise and that the board of directors did know, or ought to have known, of this exercise of power.

Had the Little Rock Bank exercised one-half the degree of care which counsel invokes against the New York Bank, no loss to anyone would have occurred. For while it may be true that Allis acted without authority in rediscounting this particular paper, the New York Bank paid the *actual proceeds of it* to the Little Rock Bank, and the latter bank is alone to blame for the fact that Allis caused the same *amount* to be entered to his credit on the books of the Little Rock Bank. But it matters not what Allis did at Little Rock. His transactions there are not and cannot be connected with the transaction in New York. The New York Bank was in no way connected with them.

The result of Allis's conduct is not changed by the attempt of counsel and his bookkeeper to label the transaction as a "transfer of funds," or a "switching of balances." What Allis did has no legal effect different from that which would have arisen if he had actually taken the same amount of money from the vaults of the Little Rock Bank. Had the transaction assumed that form, we presume counsel would not venture to contend that Allis individually, and not the Little Rock Bank, had received the proceeds of the notes. It would be the ordinary case of a thief embezzling and using his master's name to replace the amount embezzled; or first,

using his master's name and embezzling afterwards. The difference in order is immaterial; in each case the master is responsible for the money which the thief obtains in his name, if *that money* goes into the master's coffers and is used by him.

The case is identical in principle with the case of *Ditty v. Dominion National Bank*, 75 Fed.

The weightiest English case upon this subject is that of *Marsh v. Keating*, 2 C. & F., 250, decided by the House of Lords upon the opinion of all the judges. The opinion of the judges is also reported in 1 Bing. N. C., 198, and 1 Scott, 5. While the statement of facts is quite voluminous, we believe the following is a fair summary, and gives the gist of the matter. Keating, the defendant in error, was the owner of registered government annuities, transferable at the Bank of England; Marsh, Fauntleroy, and others, were partners doing a banking business, under the name of Marsh & Co.; Fauntleroy forged the signature of Keating to a power of attorney to transfer the annuities, under which they were sold and transferred on December 29, 1819, and the proceeds deposited with Martin & Co., bankers, to the credit of the account of Marsh & Co.; the deposit was entered in the pass book of Marsh & Co. as "Cash per Fauntleroy," his name denoting the person who made the deposit; this pass book was the usual book kept by the depositor in which the bank enters its deposits as made, and which it balances from time to time; while a book of the firm of Marsh & Co., Fauntleroy was usually permitted by them to keep it locked up in his own desk; a corresponding entry should, of course, have been made in the other books of Marsh & Co., as they should have corresponded

with the pass book, but was not; nor did this credit ever appear upon the other books of Marsh & Co.; Marsh & Co. drew upon Martin & Co. by drafts signed in the firm name, but Fauntleroy paid in, and by such drafts drew out large sums for his individual purposes; the account between Marsh & Co. and Martin & Co. was repeatedly balanced between December 29, 1819, and September 13, 1824, when Marsh & Co. became bankrupts; this and other forgeries of Fauntleroy having been discovered; in the meantime Fauntleroy had caused the books of Marsh & Co. to be so kept as to show a credit to Keating of dividends upon all her annuities, including those which had been sold as above mentioned, as the same became due; all of the partners of Marsh & Co., other than Fauntleroy, were ignorant of his frauds until after their bankruptcy. The suit was to establish the claim of Keating against the assets of Marsh & Co. for the proceeds of the sale made by Fauntleroy under the forged power of attorney as for money had and received, and was prosecuted in her name for the benefit of the Bank of England. The judges having been called in, their unanimous opinion was given by Park, J.; in this opinion he disposes of the question which is of interest here in the following manner (2 C. & F., 288):

“But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum

of 60,131*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one-half of the usual commission), by a check payable to Marsh & Co. into the hands of Martin & Co. to the account of Marsh & Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands; if the same money had been paid into Martin & Co.'s as the produce of the plaintiff's stock sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as 'Cash per Fauntleroy,' or because it never appeared in the house book, or any other books of Marsh & Co., but only in the pass book of that firm with Martin & Co., or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

"But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

"It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

"If they had not the actual knowledge, they had all the

means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.”

Then, after disposing of another point, the opinion concludes:

“Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.”

We submit that this case is on all fours with the case at bar. There Fauntleroy swelled the bank balance to the credit of his firm by disposing of another's property, embezzled the money, and successfully concealed his fraud until his firm went into bankruptcy—concealed it, however, through the neglect of his associates in not examining their bank pass book through which his proceedings might have been traced. Here Allis did exactly the same thing, only in place of depositing money secured by selling the property of a customer of a firm, he deposited money secured in the bank's name from a customer of the bank. The letters describing the notes rediscounted, and stating that they were discounted for the account of the Little Rock Bank sent by the New York Bank answer in all respects to the pass book entered up by Martin & Co. There was a deposit to the credit of the firm with which the rogue was connected, notice of that deposit, and embezzlement by the rogue. The only difference between the cases is one which should *a fortiori* cause the rule applied

there to be applied here, *i. e.*, that there the embezzlement was made by checking directly upon the account where the deposit was entered, while here the embezzlement was made in an entirely different place, and without drawing upon the bank where that deposit was made.

The same question was before the Queen's Bench Division in the case of *Reid v. Rigby & Co.*, (1894), 2 Q. B., 40; 10 Rep., 280, and was decided in the same way.

Substantially the same question was before this court in the case of the *Merchants Bank v. State Bank*, 10 Wall., 604, which has been already so frequently alluded to. And it came before the court again in an outgrowth from that transaction in *United States v. State Bank*, 96 U. S., 30. While the litigation between these two banks was pending, they had both brought suit against the United States to recover upon certificates of deposit for the gold there in controversy, which had been issued from the subtreasury at Boston through a fraudulent conspiracy of Mellen, Ward & Co. and Hartwell, the cashier of the subtreasury. Hartwell had embezzled from the subtreasury a large amount, and lent it to Mellen, Ward & Co.; anticipating an examination, the certificates referred to in the case of Wallace were procured and deposited at the subtreasury, so as to cover up his deficit. The United States attempted to maintain its hold upon the certificates because of the prior frauds of Hartwell, but failed. The supreme court, having sustained the title of the State Bank and its liability as between the two banks, further sustains its title as against the United States, and after alluding to the cases of *Atlantic Bank v. Merchants Bank*, 10 Gray, 532, and *Skinner*

*v. Merchants Bank*, 4 Allen, 290, as being strikingly like the case before them, continued (Tr., p. 36):

“But, surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.”

The only differences that can be suggested between this case and the one at bar are first, that there the embezzlement preceded the deposit; and second, there the embezzlement and deposit occurred at the same place, while here they did not. These, however, are distinctions without a difference. That the acts occurred at different places instead of at the same place, again makes this a stronger case as compared with that.

The familiar cases of *Louisiana v. Wood*, 102 U. S., 294, and *Chapman v. County of Douglas*, 107 U. S., 348, though not cases of embezzlement, rest upon the same base in principle, that is to say, where money is paid upon an unauthorized contract, and applied to the use of the person entitled to receive it where the contract authorized, that person will be compelled to repay. And the same principle was again applied in *Logan County Bank v. Townsend*, 139 U. S., 67.

In *Blanchard v. Commercial Bank*, — U. S. App. —, 21 C. C. A., 319; 75 Fed., 249, a case where money had been borrowed for the use of a bank by its president, without authority delegated for that purpose, the court was pressed with the decision in the *Western National Bank* case to the effect that the bank was not bound by a loan made by its presi-

dent without special authority, and met this claim with the finding of the court below that the bank had received the benefit of the money borrowed, quoting from the opinion of the court below that the lending bank had placed the loan to the credit of the borrowing bank, from which it was drawn by the checks of the borrowing bank, as in the case at bar, upon which they say that the case is manifestly different from the Western National Bank case, and that:

"The distinction in the facts justifies the conclusion of the court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatcom Bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit."

*Perkins v. Boothby*, 71 Maine, 91, presented this state of facts: The defendants were a corporation whose agent, Cleasby, without authority, borrowed money from the plaintiff, giving its notes therefor, and used the money borrowed to pay its debts. The directors of the corporation had no personal knowledge of the loan, notes, or application of the proceeds, until after the corporation had ceased to do business and gone into liquidation, when they repudiated both loan and notes, but left the appropriation of the proceeds undistributed. It was held that by thus retaining the benefit derived from the loan, the corporation became liable as for money had and received for the amount borrowed, with interest.

Another case in point is *Bank of Lakin v. National Bank of Commerce*, — Kan., —, 45 Pac., 587. The suit was brought by the National Bank of Commerce against the Bank of Lakin on two notes signed by the latter by its cashier. The



Bank of Lakin denied the authority of its cashier to borrow the money, and counter-claimed for collateral which had been sent with the notes and collected. The court below gave judgment for the plaintiff, finding that the money borrowed had been received by the Bank of Lakin, and that the only payment thereon had been from the collaterals. This finding was excepted to as not sustained by the evidence, which so far as appears from the report was only that the notes had come by mail, were discounted in regular course, credited to the Bank of Lakin, and the proceeds in part expressed to it, in part paid on its drafts, and in part sent to its Eastern correspondent for credit to it. The judgment was affirmed. There was a suggestion that the cashier had misappropriated part of the money by purchasing property with it in his own name; but the court said that the evidence supported the finding that the Bank of Lakin had actually received the money borrowed, and "if so, it would make no difference that its cashier had appropriated a part of the same to his own use. A principal cannot receive and retain the benefit of a transaction, and at the same time deny the authority of the agent by whom it was consummated."

Similar applications of the rule for which we are now contending will be found in some of the cases cited under other propositions, *supra*, and also in the following:

Bank of Commerce *v.* Bright, — U. S. App. —; 77  
Fed. Rep., 949.

Chemical National Bank of Chicago *v.* City Bank  
of Portage, — Ill. —; 40 N. E., 328.

*Johnston-Fife Hat Co. v. National Bank of Guthrie,*  
— Okla. —, 44 Pac., 192.

*Conn. River Savings Bank v. Fiske*, 60 N. H., 363.

*Thompson v. Bell*, 10 Exch., 11.

*Burke v. M. L. S. & W. Ry. Co.*, 83 Wise, 410.

If we look at it from another point of view, the Little Rock Bank should be estopped. It is undisputed that Allis was at the time the credit was taken by him indebted to his bank on overdraft \$10,678.44, besides at least \$50,000 on notes, and was insolvent. This overdraft was paid by the credit he took. Whether any of the notes were paid is not disclosed. He was continuously thereafter indebted to the bank (Tr., pp. 64, 65). Had not this overdraft been paid in this way it is evident the bank could not have collected it, unless Allis and Denney had perpetrated a like fraud and gotten money in like manner from some other source. It is also shown that the McCarthy & Joyce Company notes were executed for the purpose of raising money to be placed to its credit at the bank to which the company was largely indebted (Tr., p. 61). It was therefore to the interest of the Little Rock Bank that the notes should be rediscounted, and at least to the extent of the overdraft, it got the benefit of the proceeds.

*Lyon, Potter & Co. v. First Nat. Bank*, 85 Fed. Rep., 120, 122, 123.

This is in line with the principle announced in *People's Bank v. National Bank*, 101 U. S., 181, where the notes were negotiated by the vice president and the proceeds applied in satisfaction of a debt which the maker of the notes owed the

bank, and it was held that the *bank* received and enjoyed the proceeds.

We are unable to appreciate the distinction which counsel endeavors to make between that case and the one at bar, when he asserts that there the bank, not its unauthorized officer, got the money. If an amount equal to the proceeds of the notes in this case was applied to the payment of Allis's indebtedness, or if the Little Rock Bank had the right to so apply them, there can be no difference in principle. Here at least part of the proceeds, according to contention of counsel, was applied to the indebtedness of Allis to the bank, and if all was not so applied it was the fault of the bank. To the extent the application was made to Allis's indebtedness the result is not different from that in the People's Bank case, in fact, and to the extent it might have been made the principle is the same; there the debtor of the bank got as much of the benefit of the proceeds of the notes as Allis did in this case.

X.

**The receiver was not entitled to judgment for the balance to the credit of the Little Rock Bank on the books of the New York Bank at the time of the failure.**

When the Little Rock Bank failed it had a balance to its credit on the books of the New York Bank of \$467.86, against which the latter bank at their maturity charged the amount of the notes, leaving a balance due the New York Bank on the notes of \$24,558.03 (Tr., p. 44). The receiver, in his answer, asked judgment against the New York Bank for the balance,

\$467.86, to which that bank replied that it had applied the amount as a credit on the notes (Tr., p. 5). The receiver now claims that the court erred in refusing to render judgment in his favor for this amount, notwithstanding the fact it had been credited on the notes and the recovery by the New York Bank of the balance due on the notes.

There can be no question as to the right of the New York Bank to apply the balance towards payment of the notes.

Kentucky Flour Co. v. Merchants Nat. Bank, 13  
S. W., 910.

1 Morse on Banking, secs. 337, 338.

Scott v. Armstrong, 146 U. S., 499.

Knight v. U. S. Savings Bank, 2 Mo. App., 563.

Yardly v. Clothier, 49 Fed. Rep., 337.

Yardly v. Clothier, 51 Fed. Rep., 506.

Adams v. Spokane Drug Co., 57 Fed. Rep., 888.

Counsel does not dispute this as an equitable right, nor does he deny that it may be pleaded under the Arkansas Code, but cites Scott v. Armstrong, *supra*, to sustain his contention that the right cannot be claimed by way of set-off in this case. While the court in that case expressed the opinion that such a right could not be pleaded as a set-off, it in fact allowed the defense and cited with approval the case of Yardly v. Clothier, 49 Fed. Rep., 337, where the set-off was allowed. In the case of Adams v. Spokane Drug Co., 57 Fed. Rep., 888, 890, the court also approving this case, and referring to Scott v. Armstrong, said:

"Considering what was done, notwithstanding what was said by the supreme court, I feel warranted in following Yardly v. Clothier."

In *Scott v. Armstrong* the receiver held notes against the maker, which became due after his appointment, and the maker pleaded as a set-off a balance due from the bank on open account. In the case at bar the New York Bank held the notes and was in the possession of the amount shown by its books to the credit of the Little Rock Bank. As indicated by some of the authorities, it had the right to enter the credit on the notes at the time of the failure. Certainly it had the right to make the application when the notes matured. The application having been made, it was a satisfaction of the balance, and was a good defense at law, either *in bar*—as was pleaded (Tr., p. 5)—or as a set-off.

*Winder v. Caldwell*, 14 How., 443, 444.

*Partridge v. Phoenix Ins. Co.*, 15 Wall., 547, 549.

*Schuyler v. Israel*, 120 U. S., 506.

*North Chicago Rolling Mill Co. v. St. Louis Ore  
and Steel Co.*, 152 U. S., 616.

*Ainsworth v. Bank of California*, 39 L. R. A., 686.

*Re Hatch* (N. Y.), 40 L. R. A., 664.

Respectfully submitted,

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W. C. RATCLIFFE,

*Of Counsel.*

## ANALYTICAL INDEX.

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History of case .....	1
Errors assigned .....	4
Statement of facts.....	6
Internal management of the Fidelity Bank.....	7
Relations between Fidelity and Chemical Banks.....	11
Transactions between Fidelity Bank's Receiver and Chemical Bank.....	19
Collections by Chemical Bank upon collaterals.....	22
Dividends declared by Receiver.....	23
Receiver's suit against directors of Fidelity Bank.....	23
Evidence of banking usage.....	25
I. Borrowing is incidental to banking.....	26
As shown by legislation.....	28
As shown by works on banking.....	37
As shown by judicial opinions.....	50
As shown by usage.....	69
Summary.....	75
II. National banks may borrow.....	78
III. Borrowing done through agents.....	88
Who may be authorized by custom, recognized judicially, or proved as a fact.....	89
Judicial recognition.....	97
Custom proved.....	101
Or by abdication of superior agents.....	107
IV. Chemical Bank justified in presuming loan authorized.....	117
V. Loan ratified.....	134
By Fidelity Bank before dissolution.....	134
Notice of loan given to it.....	134
Failure to repudiate was adoption.....	142
By its Receiver since dissolution.....	147
VI. The Fidelity Bank has received the benefit of the loan, and must therefore repay.....	151
VII. <i>Western National Bank</i> case distinguished.....	167
VIII. Effect of collateral on basis for dividends.....	176
IX. Interest on dividends.....	177
X. Review of brief for appellant.....	181

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# Supreme Court of the United States.

OCTOBER TERM, 1898.

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*David Armstrong, Receiver of the Fidelity National  
Bank of Cincinnati, Ohio,*

*Appellant.*

No. 279.]

*vs.*

*The Chemical National Bank of New York,*

*Appellee.*

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Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

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## BRIEF FOR APPELLEE.

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(The references to the Record here made are to the paging as given in the margin—that of the original transcript.)

## HISTORY OF CASE.

This cause originated in a bill in equity filed by the appellee in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the appellant to establish a claim against the Fidelity National Bank arising from a loan of money secured by collateral (Rec., pp. 3-7). The answer first filed by the defendant (Rec., pp. 9-12) practically admitted the making of the



loan, but contended that the collateral should first be credited thereon and the claim established for the balance only, and alleged an offer to allow the claim provisionally for the balance remaining due after applying collections that had or should have been made from the collateral, without prejudice to the right of the plaintiff to sue for the balance. Exceptions having been made (Rec., pp. 12-15) and sustained (Rec., pp. 15-16) to this answer, an amended answer was filed (Rec., pp. 17-20) which denied the making of the loan, and contended that if it were made the collections from the collateral should be credited, and the claim established only for the balance. A replication was then filed (Rec., pp. 20-21); and upon these pleadings the evidence shown in pages 21-117 of the Record was taken, and the cause submitted to Judge Sage. His opinion at this hearing was omitted by stipulation (Rec., p. 1, paragraph 9) in making up the present transcript; but it will be found in 50 Fed., 799-809; with which should be read a memorandum prepared by him as to the form of decree and printed at Rec., pp. 117-118. A decree was entered in conformity with these opinions, which contained also an order made by consent that the original defendant should pay to the original plaintiff \$100,000, without prejudice to the rights of either party upon the appeal, with provision for restitution in case it should be found that that sum exceeded what was due. From this decree both parties appealed; and as it was vacated on that appeal, it, as well as the assignments of error and appeal bonds thereon of the original plaintiff, were also omitted in making up the present transcript (Rec., p. 1, paragraphs 10-12); the assignments of error and appeal bonds of the original defendant will be found at pp. 118-120 of the Record.

On the appeal, as well as in the court below, the val-

idity of the loan was not seriously contested, the argument being addressed to the other questions involved. The Circuit Court of Appeals (Mr. Justice Brown and Circuit Judges Taft and Lurton) held that dividends should be paid upon the indebtedness as it stood at the date of insolvency without deduction because of the collaterals; the opinions rendered are also omitted from the transcript; they will be found in 16 U. S. App. 465; 59 Fed. 372; 28 L. R. A. 231. The Chemical National Bank then filed a petition for rehearing to correct an error into which the Court had fallen, as was conceived, with reference to the computation of interest. While this was pending the the opinion of this Court in *Western National Bank v. Armstrong*, 152 U. S. 346, was pronounced; and thereafter the present appellant also filed a petition for rehearing upon the question as to the validity of the loan. These petitions having been granted and the cause reheard, the Court (Circuit Judges Taft and Lurton and District Judge Sevens) found that, in view of the decision of this Court just referred to, it was proper that each party should have an opportunity to introduce further evidence "on the issue whether the alleged loan created any liability against the Fidelity Bank at all"; and they, therefore, reversed the decree and remanded the cause with instructions to receive such evidence; and if, upon all the evidence, the issue as to the validity of the loan was decided in favor of the present appellant, to decree restitution of the \$100,000 and dismiss the bill; and if decided against him, to enter a decree directing the Receiver to allow the claim in the amount due thereon at the date of the insolvency of the Fidelity Bank, and to pay dividends thereon as to other creditors, with interest from the presentation of the claim upon dividends theretofore declared, and from declaration as to those declared thereafter, crediting the \$100,000 as a

partial payment; their opinion and the decree based thereon have also been omitted from the transcript; but the mandate, which set out the decree, will be found at pp. 323-324 of the Record, and the opinion is reported in 31 U. S. App. 65; 13 C. C. A. 47; 65 Fed. 573, and 28 L. R. A. 239.

Additional evidence was then adduced by both parties and the cause again submitted to Judge Sage, who found the issue defined in the mandate for the plaintiff, the present appellee (Rec., p. 307), and entered a decree accordingly (Rec., p. 318). The opinion of Judge Sage is also reported in 76 Fed. 339.

From this decree the defendant appealed (Rec., pp. 320-322). The appeal was heard by Circuit Judges Taft and Lurton, and District Judge Severens, and the decree below was affirmed (Rec., p. 328). The opinion of that Court, announced through Judge Taft, will be found on pp. 330-354 of the Record, and also in 54 U. S. App. 462; 27 C. C. A. 601; 83 Fed. 556.

From that decree the defendant has now appealed to this Court (Rec., pp. 356-364).

#### ERRORS ASSIGNED.

It will be found by pp. 358 and 359 of the Record that nine errors have been assigned.

Of these the first, second, and eighth are in legal effect identical, and go to the correctness of the conclusion reached by Judge Sage on the issue remanded to him after the first appeal to the Circuit Court of Appeals, as to the validity of the loan.

The third, fourth, and sixth go to the question as to how dividends should be computed upon a loan secured by collateral; the third contending that collections made upon the collateral should be credited upon the loan and divi-

dends computed upon the balance ; the fourth that a collection lost by negligence is to be treated as if made ; and the sixth that all collateral must be exhausted, and their proceeds credited before a dividend can be declared.

The fifth is a combined assignment embodying in effect all of the others just mentioned.

The seventh goes to the computation of interest upon dividends declared before the claim was established by adjudication. As printed, it contains an error which makes it senseless.

And the ninth is merely a general assignment of error in affirming and refusing to reverse.

The first, second, and eighth of these assignments are predicated upon the decision of this Court in *Western National Bank v. Armstrong*, 152 U. S. 346, and assume that the case at bar is not distinguishable from that case. We dispute that assumption ; and it was negatived by the Court below. We shall hereafter point out in detail the differences between that case and this ; differences so manifest and so broad as to prevent the decision there from being applicable here.

But we should fail in our duty to the profession, and to this Court, if we did not here and now, when the authority of that case is invoked, respectfully but earnestly request the Court to reconsider its opinion there pronounced. The briefs there submitted do not discuss the question decided by the Court ; and we are credibly informed that it received as little discussion orally at the bar. Possibly to this is owing the assumption, apparent in the opinion, that the borrowing of money is not only not part of the business of banking, but so foreign to it as to be questionable in exercise and sustainable, if at all, only by special action of the board of directors.

We expect to establish to the satisfaction of the Court

that this assumption is a mistake; that the business of banking sprang from the borrowing of money, and through borrowing only it lives and thrives. The evidence we shall adduce to the Court upon this subject sheds such a different light upon it from that in which it was evidently viewed in the *Western National Bank case* as to alter totally the impression it makes upon the mind. In the light of that evidence, we repeat, we shall request the Court to reconsider the language used in that decision, and determine whether that language shall stand as the final expression of the views of this Court upon this important subject. And in that connection we respectfully submit the strong and courageous language recently used by the Supreme Court of Indiana in *Evansville v. Senhenn*, 41 L. R. A. 728 (not yet officially reported), viz. :

“ While it is the policy of the law not to depart from decisions previously made by a court of last resort, yet the same law does require such departure where adherence to such decisions would be productive of more evil than the departure therefrom, and the establishment of the better and sounder rule.”

With this explanation of the reason why we here discuss borrowing as a part of banking as if a question of first impression in this Court, we proceed to a statement of the case at bar.

#### STATEMENT OF FACTS.

The opinion of the Court below contains a very full statement of the facts and some of the evidence shown by the present record (Rec., pp. 331-342). That statement we commend to the attention of the Court. Passages here given in quotation marks are taken from it unless otherwise specially noted; and our only reasons for departing

from or attempting to enlarge upon it, are that we may refer the Court to the parts of the record where can be found the evidence in support of the facts stated, and that we may give some of the facts in greater detail and in a little different order than they were presented by the Court below. References to the pages of the record in the passages quoted are ours, as the Court below of course did not give such specific reference in its opinion; but we have thought it not out of place to refer this Court to the items of evidence supporting the facts as stated by the Court below.

*The internal management of the Fidelity Bank.* "E. L. Harper was a director, Ammi Baldwin was cashier and Benj. Hopkins was teller of the Third National Bank [of Cincinnati]. While occupying these positions they had been engaged together in wheat gambling, and had been charged with misconduct in the management of that bank in connection with the gambling. (Rec., pp. 174-176, 285.) In February, 1886, Harper and others organized the Fidelity Bank, and the bank opened for business March 1st. Harper took [in the names of himself, Mathews and Gahr] (Rec., pp. 302-305) more than one-quarter of the stock. He was elected vice-president; Baldwin, cashier, and Hopkins, assistant cashier. Shortly after organization a committee of the directors investigated the charges concerning Harper, Baldwin and Hopkins, made by Hearne, then president of the Third National Bank, but the directors declined to hear the report. Alter, a director, who wished to read the report, made himself still more obnoxious by asking to see the call-loan account, but access to it was denied him. (Rec., pp. 172-173.) The directors held four meetings in 1886—one in February to elect officers, the second in May to appoint a committee to draft by-laws, the third in August to approve the by-laws, and the fourth a special meeting to vote a dividend. (Rec., p. 156, Q. 3; pp. 246-255.) No other business was done by the directors during that year, and Harper managed the bank without the slightest supervision of any kind. At the annual

election [in 1887] Alter was dropped as a director, and of the nine elected (Rec., p. 256), Harper, Baldwin and Hopkins, Mathews, Harper's brother-in-law, and Gahr, his confidential secretary, constituted a majority. Mathews and Gahr, were, confessedly, Harper's puppets in the board. He gave them ten shares each to qualify them, and then each also held a large amount of stock in his name, which belonged to Harper. Mathews was first elected in February, 1886, and resigned to allow some one else to be elected in his place. (Rec., p. 247.) He was re-elected in January, 1887, to take the place of Alter and remained in the board to the end. The explanation of his position in the board, and of that of Gahr, is seen by the following question and answer. (Rec., p. 237, XQ. 3.)

"Q. Mr. Mathews, you said something a little while ago off the record, which did not go down in the stenographic report—something about your directorship being nominal. Will you explain what you meant by that?

"A. Yes, sir, It was understood between Mr. Harper and me—and I think the same is true as to Mr. Gahr—that we were to be directors only until others were found to take our places; and, in explanation, I will say that one time Mr. Harper told us that one of us would have to step out—that one of us would have to resign as director to allow somebody else to supply the place—and I know Mr. Gahr and I tossed coppers to see which of us would withdraw."

"Mathews was not only Harper's brother-in-law, but he was one of the executive officers of Harper's corporations—the Riverside Rolling Mill Company, Swift's Iron and Steel Works, and E. L. Harper & Co.

"In January, 1887, Harper and Hopkins entered upon a comprehensive scheme of wheat gambling, and Baldwin was accessory thereto. In carrying out their plan, Harper raised money by discounting, with the funds of the bank, the paper of E. L. Harper & Co., Swift's Iron and Steel Works, and the Riverside Rolling Mill Company, in all of which companies he was the controlling member, and also by cashing the checks of these companies and carrying the checks as cash on the books of the bank. This was done

with the knowledge and connivance of Mathews, the director. In these ways Harper consumed of the money of the bank, between January and June, \$750,000. (Rec., pp. 271-285.) The daily discounts were recorded in a book, which was open to the inspection of the directors. Kineon, one of the directors, repeatedly called the attention of Swift, the president, to the large discounts in favor of Harper's companies and objected to it. Swift reported the matter to Harper, who said that if Kineon ran the bank he would keep all the money in the bank. Swift called Kineon's attention to Harper's large credits, and Kineon wanted to know where he got them. No further investigation or inquiry was made, however, until Kineon's resignation, hereafter described. (Rec., pp. 179-180.)

"Harper's brokers in the wheat deal were Wilshire, Eckert & Co. He advanced, from the funds of the bank to that firm, on their notes and by cashing their checks and carrying the same in cash, a million and a half dollars, to be expended for his benefit in buying wheat on the Chicago market. (Rec., pp. 272-273.) He advanced, from the funds of the bank by way of discounts, to Whitely, Fassler & Kelly, a firm who were interested in the wheat deal, \$375,000. (Rec., pp. 279-281.) He borrowed in February and March, 1887, in the name of the Fidelity Bank, from the First National Bank of New York, \$400,000, used \$113,000 of the Fidelity Bank's bills receivable in so doing and had \$400,000 transferred to his credit on the books of the Fidelity Bank, without exhibiting any written evidences of his right to such credit. (Rec., pp. 206-207, 213-219.) He borrowed in the name of the Fidelity Bank, from the Chemical Bank, the \$300,000 here in controversy, in March, 1887, and forwarded as security \$146,000 of the bills receivable of the Fidelity Bank. In June, 1887, in order to tide over the stress in which the bank then was, he borrowed from the Chemical Bank about \$1,000,000,\* and transferred to that bank bills receivable of a greater value. He did this without any action by the

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\* An inadvertent error as to the amount borrowed; see p. 19 *infra*.



board of directors. During this period of less than six months over which these transactions extended, the board of directors held five meetings—one meeting in January to elect officers, another in February to approve of Harper's purchase of \$340,000 in Government bonds to qualify the bank as a United States Government depository. These bonds were bought from the First National Bank of New York, and as a part of the contract of purchase that bank agreed to lend the \$400,000 already spoken of (Rec., pp. 213-214), but it does not appear that this was known to the directors. The third meeting was held in March to declare a dividend; the fourth in March to vote an increase of stock, and the last in May, when Kineon, a director, demanded that the bills receivable be examined. Harper objected, and told Kineon he ought to resign. Kineon said he would if Harper would buy his stock, which Harper then did. (Rec., p. 181.) A committee of directors was then appointed to examine the bills receivable, but no record is made of its reporting. No other business was done by the directors than has been stated. (Rec., pp. 256-259.)

“The by-laws of the bank provided for monthly meetings, but during the year 1886 five meetings failed for want of a quorum. The by-laws provided that the president, vice-president and cashier should have power to discount and purchase bills, notes and other evidences of indebtedness, and to buy and sell bills of exchange, and to sign all contracts, drafts and checks. The cashier was made responsible for all the moneys, funds and valuables of the bank and was required to deliver the same to the order of the directors. The president and vice-president were made responsible for all sums of money and property entrusted to them or placed in their hands by the cashier. The last by-law expressly forbade the carrying of checks or other memoranda as cash, but required them to be entered upon the books as call loans. (Rec., pp. 250-252.) In spite of this, Mathews, one director, was privy to the carrying of \$400,000 for several months in this way for Harper's accommodation. The president, Briggs Swift,

and Chatfield and Moorehead, directors, were also accommodated in this way. Watters, the general bookkeeper, testifies that from the beginning to the end of the bank, the entries of cash upon the book were false, because of these so-called cash items (Rec., pp. 211-212) ; and Hinsch, the assistant receiving teller, testifies that nothing was carried as a cash item except upon Harper's order." (Rec., p. 177, Q. 8.)

The whole situation was correctly summed up by the appellant in sec. 20 of the bill brought by him against the directors for redress because of their misfeasance and non-feasance, quoted *infra*, p. 24. Harper was suffered to conduct the affairs of the Fidelity Bank as he thought best. If any director ventured to inquire or to comment, he was forthwith suppressed (Rec., Alter, pp. 172-176, QQ. 6-16, RDQQ. 20-26 ; RRDQ. 27 ; Hinsch, p. 176, QQ. 4-6 ; Kineon, pp. 178, 181, QQ. 6-9, 26-28 ; Gahr, p. 203, QQ. 8-11 ; Watters, p. 235, XQQ. 53-62 ; Pogue, p. 244, XQQ. 1-12). For all practical purposes Harper was the bank, so far as persons dealing with it were concerned.

*The relations between the Fidelity and Chemical Banks.*—The dealings between these banks began with the opening of the Fidelity Bank, March 4, 1886, and continued till it closed its doors on June 21, 1887 (Rec., Quinlan, p. 38, QQ. 95-97). The banks made collections for each other, and in addition, the Fidelity made the Chemical the authorized New York depository for its reserve, and kept an ordinary deposit account there. In short, the Chemical was the New York correspondent and reserve bank of the Fidelity. (Rec., Quinlan, p. 30 *et seq.*, QQ. 3-8, 53, 54.) The usage between the banks was for the Chemical Bank to balance the account on the first of each month, and to send to the Fidelity Bank an account current showing the transactions for the preceding month since the last balance,

just as a bank periodically writes up, balances, and returns its depositor's pass book; the Fidelity Bank checked off this account with its own books, noted on a sheet called a reconciliation sheet all entries that were not identical; noted on the back of this sheet in detail all drafts drawn upon, but not yet presented to the Chemical, as shown by its account; reconciled the differences as far as an examination of their own books and papers would explain; and then wrote to the Chemical Bank for explanations as to the remaining discrepancies, mentioning them item by item, and generally requesting a return of that letter with the explanations noted thereon; this request was complied with by the Chemical, and occasionally other letters were sent, giving further explanations as to matters not fully investigated when the Fidelity's letter was returned. (Rec., Quinlan, p. 32, Q. 31; Watters, p. 224, QQ. 1, 2; pp. 228-233, XQQ. 1-38; Firth, pp. 139 *et seq.*)

On February 28, 1887, Harper, vice-president of the Fidelity Bank, mailed at Cincinnati to the cashier of the Chemical Bank in New York a letter, of which the following is a copy (Rec., p. 21):

"BRIGGS SWIFT, *President.*  
AMMI BALDWIN, *Cashier.*

E. L. HARPER, *Vice-President.*  
BENJAMIN E. HOPKINS, *Asst Cashier.*

United States Depository.

THE FIDELITY NATIONAL BANK.

Capital, \$1,000,000.00.

CINCINNATI, *February 28, 1887.*

Wm. J. Quinlan, Jr., Cashier Chemical National Bank,  
New York City:

*Dear Sir:* Enclosed herewith we hand you for credit our certificate of deposit No. 345 for \$300,000, with bills as collateral, as follows: (Then was set out a list of twenty-seven notes, aggregating \$326,000.) We desire to keep a large reserve with you, and we trust you will make the rate

as low as you proposed some time since. Please place the amount to our credit and advise the rate.

Respectfully yours,

E. L. HARPER, *Vice-President.*"

The certificate of deposit inclosed was as follows (Rec., p. 22):

"This certificate is not subject to check, but must be presented to draw money.

THE FIDELITY NATIONAL BANK.

No. 345.

CINCINNATI, *Feb. 28, 1887.*

E. L. Harper has deposited in this bank three hundred thousand dollars (\$300,000.00) payable to the order of himself on return of this certificate in current funds.

\$300,000.00.

AMMI BALDWIN, *Cashier.*

Endorsed: E. L. Harper."

This letter of February 28th was not copied into the letter-press copy books of the Fidelity Bank.

The letter reached New York on March 2d, and upon that day Quinlan, cashier of the Chemical Bank, wrote and mailed the following letter (Rec., pp. 31-33):

"NEW YORK, *March 2, 1887.*

A. Baldwin, Esquire, Cashier:

*Dear Sir:* Your favor of the 28th inst. has been received. We credit Fidelity National Bank \$300,000, and shall be considerate as to rate of interest when the loan is paid. . . .

WM. J. QUINLAN, *Cashier.*"

Upon the books of the Chemical Bank was entered, on March 2d, this credit in favor of the Fidelity Bank (Rec., p. 32. Q. 27):

"Fidelity temp. loans, . . . . \$300,000."

The letter just mentioned was the only advice of the loan sent by the Chemical Bank, until its March account

current was transmitted in April, and could not have reached Cincinnati by due course of mail before March 4. But in the meantime, on March 2, the bookkeeper of the Fidelity Bank, under instructions from Harper, had given Harper personally credit in that bank for \$300,000, and had charged the Chemical Bank with the same sum. (Rec., Watters, pp. 73-74, QQ. 20-26.)

Of the collateral sent at that time, \$146,695.30 belonged to the Fidelity Bank (Rec., p. 75, QQ. 35, 36). The residue comprised four notes made by J. W. Wilshire, and indorsed by J. V. Lewis, each for \$25,000, which were accommodation paper executed and given to Harper for discount in furtherance of his wheat deal, the proceeds to be placed to the credit of Wilshire, Eckert & Co. (Rec., pp. 57-58); two made by Swift's Iron & Steel Works for \$25,000, each; and two by the Riverside Iron & Steel Works for \$15,000, each. The record contains nothing as to the circumstances under which these latter notes were made; but it does appear that Harper, who was the controlling spirit in each of these concerns, used their paper freely to further his wheat deal.

On the stub of certificate No. 345, in the certificate of deposit book then in use in the Fidelity Bank, is written the word "canceled" (Rec., Watters, p. 78, XQ. 54), and the only entry made on that book which can relate to this transaction is on the stub of certificate No. 497, which records the issue of a certificate to E. L. Harper, without date, for \$300,000 deposited by himself; the stubs of Nos. 496 and 498 are dated, respectively, May 17 and May 21 (Rec., Watters, p. 72, Q. 9). The bookkeeper of the Fidelity Bank testifies he knows of no paper or obligations given by Harper to the Fidelity Bank at the time of the issue of that certificate, and that

ultimately his checks drawn were sufficient not only to exhaust this \$300,000, but several hundred thousand dollars besides (Rec., pp. 74, 83; QQ. 27, 106-108); but it is not shown that Harper did not have \$300,000 to his credit on February 28, 1887, nor what entries, if any, were made in his personal account at or about that date other than the one above mentioned; and it does appear that the amount constantly standing to Harper's credit was so large as to be a cause of gratification to the president of the bank (Rec., pp. 179-180, 182; QQ. 16, 17; XQQ. 13-15). It is quite consistent with the other facts appearing in the record that Harper may actually have had \$300,000 to his credit on February 28, 1887, when this certificate of deposit was drawn; and it is not without significance in this connection that the bill of complaint subsequently filed by the receiver against the directors (Rec., pp. 271-289), though charging them for suffering many specific irregularities of Harper, does not charge that he caused this certificate of deposit to be issued without having funds then in the bank to answer for it, nor does it charge that his personal account was ultimately overdrawn.

Shortly after the first of April, 1887, the Chemical Bank sent to the Fidelity Bank its statement of account for the month of March as usual; upon this, under date of March 2, appeared a credit to the Fidelity Bank, as follows: "Tem. Loan, \$300,000." The account starts on March 1st with a balance in favor of the Fidelity Bank of \$24,360.65, and ends on April 1st with a balance against it, notwithstanding the above credit, of \$32,675.97. The account was received by the Fidelity, turned over to Watters, the general bookkeeper, checked up by him with the books of the Fidelity Bank, found to be O. K., and filed away with the archives of that bank. (Rec., Watters, p. 47; QQ. 48-49,

and Exh. 10.)\* The usual reconciliation sheet was made out, showing the discrepancies between the books of the two banks. (Rec., p. 259.) Whether any letter was sent relating to the reconciliation is not known; no such letter can now be found in the Fidelity Bank files, where it would naturally be because returned with the answer on its face (Rec., McCauslen, pp. 158, 162; QQ. 16-22, 48-49; Watters, pp. 224, 229; QQ. 2-10; XQQ. 8-17); nor is there such a letter, or trace of any answer to it, among the papers of the Chemical Bank (Rec., Quinlan, p. 122; QQ. 3-6). The probability is, however, that such a letter was written, for the reconciliation sheet for March shows sundry items of difference; and the letter of the Chemical Bank to the cashier of the Fidelity Bank, dated May 11, 1887 (Rec., p. 269), refers to items appearing both upon the March account and the March reconciliation sheet, and is evidently an answer to inquiries as to those items. But whether such a letter was written or not, it is certain the loan of \$300,000 was never disputed, nor was the accuracy of the entry of that loan reported by the Chemical Bank ever challenged or referred to. This is certain because: (1) No reference to this matter appears on the March reconciliation sheet, on which all differences were first noted; and (2) from the testimony of Watters, who says that, misled by the identity of the figures of the loan with those on the Fidelity's books for the transfer of funds directed by Harper, he checked off the items as corresponding, and needing no further investigation. At the same time, he admits, and could not but admit, that the items were not identical, and that the entry on the statement furnished by the Chemical Bank signified clearly and distinctly a loan by that bank

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\* This Exhibit was omitted by inadvertence from the original transcript; it has since been certified by stipulation, and printed separately, to be attached at the end of the main record.

to the Fidelity Bank, and nothing else. (Rec., Watters, pp. 226, 233; QQ. 12-16; XQQ. 39-40.)

On April 24, 1887, one of the bills receivable sent to the Chemical Bank as collateral fell due—a note by the Jung Brewing Co. for \$10,000; and as that day was Sunday, was paid to the Fidelity Bank on April 23. (Rec., Watters, p. 83, QQ. 109-113.) This note had been returned from the Chemical Bank probably on April 19; its proceeds were never remitted back. (Rec., Quinlan, p. 39, XQ. 109; we take it the statement there, “returned May 19,” is a mistake in reading the entry when the deposition was taken.)

The account for the month of April, 1887, having been sent by the Chemical Bank early in May, a reconciliation sheet was made for that month as usual (Rec., p. 261); and on May 12 a letter was written by the Fidelity, calling attention to the matters of difference needing adjustment, which was returned on May 19, 1887, with the answer written thereon. (Rec., p. 263.) Meantime, on May 11, the letter above referred to had been sent by the Chemical Bank, referring to differences in the March account (Rec., p. 269); and on May 18 another letter had been sent by it in partial answer to the Fidelity Bank's inquiries of May 12. (Rec., p. 269.)

On May 19th the following telegram was sent to the Chemical Bank (Rec. pp. 27, 37-38; QQ. 89, 90):

“CINCINNATI, *May* 19, 1887.

To Chemical National Bank, New York:

We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here. FIDELITY NATIONAL BANK.”

On May 20th Harper wrote and mailed the following



letter on the letter head of the Fidelity Bank (Rec., pp. 27, 38; QQ. 92-94) :

“ May 20, 1887.

William J. Quinlan, Jr., cashier, New York.

*Dear Sir:* Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will to-morrow send you new notes to take place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you.

Yours truly,

E. L. HARPER, V. P.”

On May 21st Harper wrote and mailed the following letter, also on the letter head of the Fidelity Bank (Rec., pp. 23; 29, QQ. 40-45) :

“ CINCINNATI, May 21, 1887.

Chemical National Bank, New York City.

*Gentlemen:* Enclosed herewith we hand you to hold as collateral the following bills: (Then follows a list of twenty-one notes, aggregating \$230,592.46.)

Will you kindly return to me the following: (Then follows a list of nineteen notes of those forwarded in his letter of February 28th.)

We will pay the loan July 15, 1887, if agreeable to you, and will pay interest now to that date.

Respectfully yours,

E. L. HARPER, *Vice-President.*”

The substitution of collateral was effected in accordance with this request.

Of the collateral returned \$92,495 belonged to the Fidelity Bank; the residue, aggregating \$105,000, comprised the notes of Swift's Iron & Steel Works, and of the Riverside Iron & Steel Works, and one of the Wilshire notes above alluded to. None of the substituted collateral belonged to the Fidelity Bank. (Rec., p. 76, Q. 40.)

This left the collateral remaining with the Chemical

Bank as shown in Exhibit A attached to its bill of complaint (Rec., p. 7), amounting in the aggregate to \$334,382.39; and of this only \$19,200—four notes of the Champion Machine Company, one for \$4,500 maturing July 24, one for \$5,200 maturing July 28, one for \$5,000 maturing August 3, and one for \$4,500 maturing August 20, all in 1887—belonged to the Fidelity Bank.

The account for the month of May was forwarded by the Chemical Bank, checked and reconciled by the Fidelity Bank, and a reconciliation sheet prepared, and questions asked thereon and answered, as usual, early in the month of June. (Rec., pp. 264-265.) Later in June the Fidelity Bank requested of the Chemical Bank a further loan, and forwarded as security a little over a million dollars, face value, of bills receivable, upon which the Chemical Bank, on June 17, advanced \$200,000 by crediting the deposit account of the Fidelity Bank with that sum as a loan. (Rec., Quinlan, p. 35, QQ. 55-57; p. 105, Armstrong Exh. 6; p. 266, June reconciliation sheet.) The Fidelity Bank suspended payment upon June 21, and at that time was indebted to the Chemical Bank by way of over-draft, after putting to its credit the two loans above mentioned, one of \$300,000 on March 2, and the other of \$200,000 on June 17, in the sum of \$54,938.49. (Rec., p. 105, Armstrong Exh. 6.)

*The transactions between Armstrong, as receiver of the Fidelity Bank, and the Chemical Bank.*—Armstrong was commissioned as receiver on June 27, 1887 (Rec., Armstrong, p. 85, Q. 2). He seems at once to have taken up the Chemical Bank matter, for on July 6 that bank wrote him, stating specifically the existence of the two loans just above mentioned, and referring to prior correspondence with him (Rec., p. 268). About that time, the account for the June business up to June 20 was forwarded by the Chemical Bank, ex-

amined by Armstrong, and a reconciliation sheet made, and on July 12, a letter was written by him to the Chemical Bank as to differences found on such reconciliation sheet, which was returned with explanations written on its face, as usual (Rec., pp. 266-267). On July 23, and again on August 24, the Chemical Bank advised Armstrong of the payment of two of the notes forwarded as collateral for the March loan (Rec., p. 115, Exh. 6, 7). The Chemical Bank credited these collections and all others upon that collateral, as they came in, to the credit of the account of the Fidelity Bank, and charged that account with the balance of \$54,938.49 due on June 20 by way of over-draft as above stated, and with the two loans of March 2, \$300,000, and June 17, \$200,000, and with sundry other charges, until, on November 26, there appeared a balance to the credit of the Fidelity Bank amounting to \$33,809.89, when that balance, with the uncollected collateral or orders therefor, was remitted to Armstrong and the account closed (Rec., p. 115, Watters Exh. 8, 9; p. 35, Quinlan, QQ. 58-65; p. 46, XQQ. 172-183, 200; p. 94, Armstrong Q. 62; pp. 106-111, Armstrong Exh. 7, 8. Mr. Armstrong is mistaken in saying Wilshire's note was not returned; see p. 109, seventh item); this upon the assumption that they had a general lien upon all of the collateral to secure all of the indebtedness. In the meantime, there had been some correspondence between the Chemical Bank and Armstrong upon this matter, which resulted in a letter by Armstrong, dated November 14, 1887 (Rec., p. 24), in which he does not dispute the validity of either of the loans, but does claim that the collateral forwarded in June must be applied solely to the payment of the loan made in that month, and of the over-draft existing after crediting the two loans. To this letter the Chemical Bank responded by two letters, dated November 17 and 18, 1887 (Rec., pp. 100-101), in which

they re-assert their right to a lien upon the entire collateral to secure the entire indebtedness. The letter transmitting the collateral is dated November 25, 1887 (Rec., p. 109, Armstrong Exh. 8). Armstrong answered it by a letter dated November 29 (Rec., p. 111, Armstrong Exh. 9). From the answer, it is evident that the letter transmitted not only the notes there described, but orders for other collateral which had been sent by the Chemical Bank to its attorneys for collection; Armstrong's acknowledgment, as stated in this letter, was without prejudice to his claim previously asserted. Subsequently, by stipulation between Armstrong and the attorney of the Chemical Bank, the residue of the collateral was turned over without prejudice to the rights on either side (Rec., p. 106, Armstrong Exh. 7).

Then followed a suit by Armstrong against the Chemical Bank in the United States Circuit Court for the Southern District of New York, wherein Armstrong sought to recover the surplus of the proceeds of the collateral given in June, 1887, after paying the June loan and over-draft as shown by the bank's books, *i. e.*; with the March loan credited to the Fidelity Bank and unpaid. The Chemical Bank sought to maintain a general lien on all collateral, both March and June, for all indebtedness. Armstrong was successful. (Rec., p. 36, Quinlan, QQ. 73-78.) The decree, rendered in May, 1890, required the Chemical Bank pay him \$271,808.34 with interest from May 7, 1890. (Plaintiff's Exh. 7, Rec., p. 26.) The further proceedings in this case are not in evidence; but the opinion of the Court, announced January 2, 1890, may be found in 41 Fed. 234, and 6 L. R. A. 226. On May 22, 1890, the Chemical Bank paid Armstrong the amount due under the decree. (Rec., p. 29.)

Meantime, after the announcement of the opinion of the Court, and shortly after April 3, 1890, the Chemical

Bank presented formal proof of its claim to Armstrong as receiver, asking for an allowance of dividends upon the amount due it at the time of the failure of the Fidelity Bank (Rec., p. 102); to this Armstrong replied by letter dated April 25, 1890, but delivered May 2, 1890, rejecting the claim as tendered upon the ground that collections from collaterals made and to be made should be credited as payments before allowing dividends; and offering to accept a proof for \$200,000, and to pay dividends thereon, without prejudice to the right to sue for the balance not allowed, and with the stipulation that should the Court subsequently hold that he was right in his contention, subsequent collections from collaterals should be applied in reduction, and the dividend percentage thereon accounted for by the Chemical Bank to him (Rec., p. 101). This proposition was declined and this suit instituted on May 10, 1890.

*Collections by Chemical Bank upon its collaterals.* As previously stated, nothing was collected prior to the insolvency of the Fidelity Bank. After that time the Chemical Bank collected at their respective maturities the three notes made by J. W. Wilshire and indorsed by J. V. Lewis, each for \$25,000, falling due July 28, August 28, and October 1, 1887 (Rec., p. 37, Q. 79; p. 115, Exhibits 6 and 7). The remaining note of this series, which matured June 28, 1887, is still in its hands and unpaid, no sufficient notice of non-payment having been given to Lewis, the indorser, and the only party to the note then responsible (Rec., pp. 47, 48; QQ. 189-195).

Since this suit was brought the receiver of the Fidelity Bank has accounted to the Chemical Bank for the proceeds of a compromise made by him just previously, and while the securities were in his hands as above men-

tioned, upon the four notes of the Champion Machine Company; the details are not of importance; suffice it to say that as a result the Chemical Bank received in cash on June 2, 1890, \$4,481.49; on March 24, 1891, \$12.50; and on March 28, 1891, \$184.40; and has on hand in addition bonds of Amos Whitely & Co. (successor of the Champion Machine Company) for \$2,300, and of Whitely, Fassler & Kelley for \$9,600 (Rec., pp. 93-96, 85, 87, 105; N. B., Exh. 5, referred to on p. 105, is printed on p. 87, in answer to Q. 13).

The Chemical Bank also received in March, 1891, \$2,917.12 from the trustee for creditors of E. L. Harper & Co., the indorsers upon the fifteen Whitely, Fassler & Kelley notes which were part of the collateral substituted in May (Rec., p. 117). No other cash collections have been made upon the collateral, and what remains on hand may be considered as practically worthless.

*Dividends declared to creditors of Fidelity Bank.* Dividends to the amount of fifty-eight per cent have been declared to the creditors of the Fidelity Bank as follows (Rec., p. 93, Q. 53; p. 319): October 31, 1887, twenty-five per cent; June 15, 1889, ten per cent; July 30, 1890, ten per cent; August 5, 1891, five per cent; August 15, 1894, eight per cent.

*Receiver's suit against the directors.* "Armstrong, the receiver, filed a bill against the directors [of the Fidelity Bank on September 18, 1887] to recover compensation for the loss occasioned and made possible by their negligence and failure to supervise Harper's control of the bank. He charged them therein with liability for losses arising from excessive loans made by the bank to Wilshire, Eckert & Co., to Harper's companies, and to Whitely, Fassler & Kelly. He also charged them with permitting Harper, by their negligence, to embezzle more than \$500,000, and

from the evidence adduced in support of the averment, it is clear that this charge referred to the transfer of funds by Harper, to his credit, of \$700,000, at the time when he had obtained the loans from the First National Bank and the Chemical National Bank of New York. The solvent directors compromised the suit by paying the receiver \$450,000, of which Swift, the president, paid \$300,000; Chatfield, one director, \$100,000; and Pogue & Zimmerman the remaining \$50,000. (Rec., pp. 270-301, 206-222.)"

"Armstrong, the receiver, in his bill against the directors, said (Rec., p. 283, § 20):

" 'And complainant further avers that the said E. L. Harper, vice-president of said association, was permitted by the said directors of said bank to manage the affairs of said banking association and to have charge and control of its moneys and assets without any investigation or control of his management of the business of said banking association.'

"Again, the bill averred as follows (Rec., p. 285, in § 23):

" 'Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management, and control of the moneys, assets, and affairs of the said Fidelity National Banking Association; and complainant avers that by reason of said facts and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe keeping and investment of its moneys and other properties, during the whole time, during which the money of said association was being loaned and embezzled and misappropriated, as hereinbefore set forth; yet the said president and the said directors, and each of them, in gross and willful disregard of their duty as such directors, wholly failed to exercise the slightest



diligence, or make the slightest investigation of the conduct of the business of said bank ; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged and its moneys and assets were being embezzled and misappropriated in the manner hereinbefore set forth ; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors, would have prevented the losses described to said banking association. ' "

*Evidence of banking usage.* Upon the second hearing in the Circuit Court, after the decision of this Court in the *Western National Bank* case and the remanding which followed that decision, it was shown by the testimony of bankers in Cincinnati and New York that, prior to that decision, it was usual, and an ordinary incident in the banking business, for one bank to borrow from another ; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank, president, vice-president, if actively engaged, and cashier, to make application for such a loan, and it was never considered necessary for them to submit proof of their authority so to do ; and that the loan would be made either by re-discounting negotiable securities offered by the borrowing bank, or by a loan with such securities as collateral, or at times without security. We shall have occasion hereafter to quote some of this testimony, and in that connection will mention more particularly the qualifications of the different witnesses. It is enough here to refer to the summary of their testimony given by the Court below (Rec., pp. 334-337), and to say that they were executive officers of some of the most prominent banks in New York and Cincinnati, and that their testimony stands entirely



uncontradicted, the receiver not having called a single witness upon this subject, or to show that the directors of the Fidelity Bank were not fully aware of this usage.

### ARGUMENT.

We have been thus particular and minute in detailing the facts of the case that the Court might be made fully aware at the outset how different the state of affairs presented by this record is from that which was presented in *Western National Bank v. Armstrong*, 152 U. S. 346; and that even should your honors be disposed to adhere to the definition of the banking business given in that opinion, yet you should see at the threshold of your consideration of the case at bar that, whatever might be thought as to the authority of Harper and Baldwin to negotiate the loan here in question, the assets of the Fidelity Bank were plainly responsible for the money lent on the ground either of ratification of the loan made in fact or conclusively presumed by estoppel, or of that bank having used the money which the appellee lent.

But while thus maintaining that the decree below can and should be affirmed consistently with that opinion as it stands, yet because we believe that opinion to be a departure from principles of law theretofore considered well settled, and, if adhered to, likely to cause trouble and confusion in the banking business, we invite the Court to a reconsideration of it, and therefore shall first discuss the nature of the business of banking.

#### I. POWER OF BANKS TO BORROW.

As a rule wherever money is to be used in a business there the borrowing of money is incidental to that business. Because of this the doctrine is well settled that all commer-

cial corporations have an implied power to borrow money. Morawetz on Corporations, sec. 342; 4 Thompson on Corporations, sec. 5697. This doctrine has been affirmed by this Court in *Railroad Company v. Howard*, 7 Wallace, 392, 412, in the following words:

“Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.”

The question here is whether this doctrine and this presumption apply to banks. Undoubtedly they are borrowers of money in the course of their business; indeed the primary object of their business is to borrow money. For their circulating notes merely represent loans to them of specific sums payable upon demand; and their deposit accounts are also but loans payable upon demand in sums desired by the depositor. *Phoenix Bank v. Risley*, 111 U. S. 125; *State v. Bartley*, 39 Neb. 353; 23 L. R. A. 67. These are the every day business of the bank; and without one or the other of them it would die of dry rot. So the question here involved is not whether borrowing money in this way is incidental to banking, but assuming that it is whether any other kind of borrowing is so incidental; in brief, whether it is a recognized part of the banking business to hire money; to obtain it on time, or with the understanding that it shall not be immediately withdrawn, and to pay for its use.

We submit that transactions of this nature have always been considered a legitimate and ordinary part of the banking business. In proof of this we shall call as witnesses legislation that has been passed creating banks,

well informed writers upon the banking business, judicial opinions by Courts of the highest standing, and the uncontradicted sworn testimony of bankers of the present day. We had made very full citations from works on banking, and reported decisions upon this subject in our brief filed in the Court below. Counsel for defendant in error in Case No. 206, on the docket of this Court for this term, *H. F. Auten as Receiver of the First National Bank of Little Rock, Arkansas, v. United States National Bank*, have honored us by quoting *verbatim* that portion of our brief; and as that case will, in the ordinary course of events, be heard before this so that the Court will be familiar with the matter there quoted, we shall not here repeat all of the citations we made below. We shall abridge those there used, preserving their most salient points; and to them we shall add others of which we made no use below.

#### LEGISLATION.

The earliest statute recognizing such borrowing as a part of the banking business was passed in 1670, 22 and 23 Charles II; we have not access to the original statute, but we find the following quotation from it in vol. I, p. 541, of *Lex Mercatoria* by Wyndham Beawes (Joseph Chitty's edition, published in 1813):

"Whereas, several persons being goldsmiths, and others, by taking up or borrowing great sums of money, and lending out the same again for extraordinary hire and profit, have gained and acquired to themselves the reputation and name of bankers, etc."

Next is the noted act of 1694 establishing the Bank of England, 5 & 6 W. & M., c. 20. This act nowhere in terms conferred the power to borrow money; but its existence was recognized by the limitation which was put upon

it in section 26, by which the bank was forbidden to borrow more than the amount of its capital, in the following terms :

“That the said corporation so to be made, shall not borrow or give security by bill, bond, covenant or agreement under their common seal for any more, further or other sum or sums of money, exceeding in the whole the sum of twelve hundred thousand pounds, so that they shall not owe at any one time more than the said sum, unless it be by act of parliament upon funds agreed in parliament ; and in such case only such further sums as shall be so directed and allowed to be borrowed by parliament, and for such time only, until they shall be repaid such further sums as they shall borrow by such authority.” And if this limitation be exceeded, that the stockholders shall be responsible for the excess *pro rata*.

It will be observed that the words of obligation here mentioned are not confined to those which would create indebtedness merely by a bank note or a bank deposit, but extend beyond and cover every kind of liability, and that they imply not merely demand loans, but loans on time. If one could be in doubt as to this on reading the section, such doubt would be removed by reading the first act in which parliament gave power to borrow a further sum, section 30 of the act of 1697, 8 & 9 William III., c. 20 ; for this, after reciting the section just mentioned, gave power to borrow an additional sum of money by bills or agreement under their common seal, with the proviso, however, that—

“The said governor and company do oblige themselves in their said bills, by them to be given out, to answer and pay the money therein mentioned upon demand.”

Section 28 of the act just mentioned declared that no other bank, or institution in the nature of a bank, should be countenanced by parliament during the existence of the

Bank of England. Ten years later, in section 9 of the act of 6 Anne, c. 22, this provision was recited, and the section continues :

“ *Nevertheless since the passing of the said act some corporations by colour of the charters to them granted, and other great numbers of persons, by pretence of deeds or covenants united together, have presumed to borrow great sums of money, and therewith, contrary to the intent of the said act, do deal as a bank, to the apparent danger of the established credit of the kingdom : now for preventing of such practice in time to come, and the mischiefs thence to arise, be it enacted by the authority aforesaid, That from and after the twenty-ninth day of September, in the year of our Lord seventeen hundred and eight, during the continuance of the governor and company of the bank of England, it shall not be lawful for any body politick or corporate whatsoever, erected, or to be erected, other than the said governor and company of the bank of England, or for other persons, whatsoever united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money on their bills or notes, payable at demand, or at any less time than six months from the borrowing thereof.* ”

The enactment just mentioned, with modifications, has since been continued in force, and is generally said to be *the banking franchise* of the Bank of England. It will be noted that the prohibition is not merely as to demand notes and bills, but as to any notes and bills having less than six months to run, thus conclusively showing that the issue of time paper, and consequently the borrowing of money on time, was then, and has since been, considered a natural feature of the banking business.

Section 39 of an act passed in 1716, 3 George I, c. 8, enlarged the borrowing powers of the Bank of England,

and removed from such loans the restrictions of the usury laws, in the following terms :

Section 39. "And it is hereby enacted, that the said governor and company of the bank of *England*, or their successors, shall have power and authority, and they are hereby enabled, in case they shall think fit, from time to time, and at any time or times, at their own good liking, to borrow or take up money upon any contracts, bills, bonds or obligations, under their common seal, or upon credit of their capital stock or stocks, or any part thereof, or otherwise, for any time, or to be paid upon demand, and at such rates of interest, or upon such terms as they shall think fit, although the same shall happen to exceed the interest allowed by law to be taken, and to give such security for the same, as shall be to the satisfaction of the lenders respectively; any former law, statute, prohibition, restriction, clause, matter or thing whatsoever to the contrary notwithstanding."

Passing now to this country, we ask attention to the act approved February 25, 1791, incorporating the first Bank of the United States with a capital of \$10,000,000, 1 U. S. Stat. at Large, 191. Paragraph 9 of section 7 was modeled upon section 26 of the Bank of England act of 1694; but it contains a modification that is noteworthy. It reads :

"The total amount of the debts, which the said corporation shall at any time owe, whether by bond, bill, note, or other contract, shall not exceed the sum of ten millions of dollars over and above the moneys then actually deposited in the bank for safe-keeping, unless the contracting of any greater debt shall have been previously authorized by a law of the United States." Yet, if the limitation were exceeded, the corporation was liable, and its non-dissenting directors as well.

By thus restricting the right to borrow its existence is

necessarily recognized. The restriction is not upon the indebtedness created by deposit with the bank, for that is expressly excepted ; nor is it limited to its circulating notes, for the words of obligation extended beyond those and include *bond*, bill, note, or *other contract*. Its paper of circulation was the notes mentioned in paragraph 13 of section 7 (to which we shall advert more particularly shortly, in connection with the act of 1816), as well as paragraph 9 ; the words *bond and other contract* in paragraph 9 refer to other kinds of indebtedness, that is to say, to the borrowing of money in other ways for the use of the bank.

The act approved April 10, 1816, creating the second Bank of the United States, with a capital of \$35,000,000, 3 U. S. Stat. at Large, 266, was even more explicit. Paragraph 8 of section 11 was like paragraph 9 of section 7 of the act just mentioned, *mutatis mutandis*. Paragraph 12 of that section is substantially the same as paragraph 13 of section 7 of the earlier act, with the exception that it adds two provisos which serve to explain the nature of the earlier enactment, and to make it still more apparent that power was given to the bank to borrow money on time for use in its business. We print paragraph 12 as it is found in the act of 1816, italicising the words in the latter act which are not found in paragraph 13 of section 7 of the act of 1791, and adding in brackets words in that paragraph which are not found in paragraph 12 of section 11 of the act of 1816 :

“*Twelfth.* The bills, obligatory and of credit, under the seal of the said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons, and his, her, or their *executors or administrators*, and *his, her or their assignee or assignees*, and so as absolutely to transfer and vest the property thereof in each and every



assignee or assignees successively, and to enable such assignee or assignees, and *his, her or their executors or administrators*, to [bring and] maintain an action thereupon in his, her, or their own name or names: *Provided, That said corporation shall not make any bill obligatory, or of credit, or other obligation under its seal for the payment of a sum less than five thousand dollars. And the bills or notes which may be issued by order of the said corporation, signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her or their order, or to bearer, although not under the seal of the said corporation, shall be binding and obligatory upon the same, in [the] like manner, and with [the] like force and effect, as upon any private person or persons, if issued by him, her or them, in his, her or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which shall be payable to any person or persons, his, her or their order, shall be assignable by endorsement, in like manner, and with the like effect as foreign bills of exchange now are: and those which are payable to bearer shall be assignable and negotiable by delivery only: Provided, That all bills or notes, so to be issued by said corporation, shall be made payable on demand, other than bills or notes for the payment of a sum not less than one hundred dollars each, and payable to the order of some person or persons, which bills or notes it shall be lawful for said corporation to make payable at any time not exceeding sixty days from the date thereof."*

The seventeenth paragraph of section 11 of the act of 1816 contained another provision the like of which is not found in the act of 1791, viz.: "*Seventeenth. No note shall be issued of less amount than five dollars.*" The changes in current legal phraseology since those acts were written call for a few observations. The first part of paragraph 13 of section 7 of the act of 1791, and its equivalent in paragraph 12 of section 11 of the act of 1816, relating to bills



obligatory and of credit under the seal of the corporation, was borrowed almost *verbatim* from section 29 of the act creating the Bank of England, 5 and 6 W. & M., c. 20. In the course of time the words *bill obligatory* have almost vanished from common use. Such an instrument was what we now call a single bond, that is, an instrument under seal reciting an obligation to pay money without condition or penalty. Thus Lord Coke says, Co. Litt. 172:

“Obligation is a word of his own nature of a large extent; but it is commonly taken, in the common law, for a bond containing a penalty, with condition for payment of money, or to do or suffer some act or thing, etc., and a bill is most commonly taken for a single bond without condition.”

In Jacob's Law Dictionary, in defining the word *obligation*, the passage just quoted is referred to, being preceded by the following:

“A bond, containing a penalty, with a condition annexed for payment of money, performance of covenants, or the like; it differs from a bill, which is generally without a penalty or condition, though a bill may be obligatory.”

And in Anderson's Law Dictionary, under the word *bill*, it is said:

“Bill: bill obligatory, bill penal, bill single, a bond without a condition. An instrument acknowledging indebtedness in a certain sum to be paid on a day certain. Differs from a promissory note in having a seal affixed. ‘Bill obligatory’ has a seal.”

So in *Farmers, etc., Bank v. Greiner*, 2 S. & R. 114, Chief Justice Tilghman said in the year 1815:

“Bills of exchange and bills obligatory are very different things. . . . A bill obligatory is an instrument in

common use and too well known to be misunderstood. It is a bond without a condition, sometimes called a single bill, and differing from a promissory note in nothing but the seal which is annexed to it."

With this definition in mind, the object of the provision last quoted from the acts creating the two banks of the United States becomes clear. The first half, relating to bills obligatory and of credit, refers to obligations under seal, given for money borrowed, and restricted by the second act to large sums. The second half relates to commercial paper—not merely to ordinary bank notes, but to all negotiable instruments, because it refers to instruments payable to order as well as to those payable to bearer—and to those payable on time as well as to those payable on demand. As the act was intended to operate throughout the United States, and as the statute of Anne, which put promissory notes upon the footing of bills of exchange, was not operative in all of the states, it was necessary to enact that notes as well as bills should be negotiable. But post-notes and post-bills, in other words, time obligations, were required to be payable to order and not bearer, and to be for a sum of at least one hundred dollars. Thus power was given to these banks, not merely to borrow money by issuing circulating notes, but to borrow upon all the recognized instruments of commerce, and in any amount and on any time, the only restriction being that if the loan were on time the instrument must run to a named person or his order, and not merely to bearer, and must be for a loan of at least one hundred dollars: and if the time were longer than sixty days, the instrument was assignable merely and not negotiable, and must assume the more solemn form of a sealed obligation, and be for not less than five thousand dollars.

The failure of the United States Bank of Pennsylvania, which grew out of the ashes of the second Bank of the United States, and the panic of 1837, led the legislatures of several of the states to adopt general laws for the formation of banks. The model of these was the Free Banking Law of New York, passed in 1838. This contained no express legislation as to borrowing; but, as we shall point out when we come to mention the judicial opinions, that power was held to be conferred thereby.

Chapter 36, of the Revised Statutes of Massachusetts, passed November 4, 1835, contains the general banking law of that state. Sections 9 and 10 of that act read as follows:

“IX. The total amount of debts, which any bank shall at any time owe, shall not exceed twice the amount of its capital stock, actually paid in, exclusive of sums due on account of deposits not bearing interest; nor shall there be due to such bank, at any time, more than double the amount of its capital stock actually paid in.

X. Debts due to any bank from any other bank, including bills of the bank so indebted, shall not be deemed debts due to a bank, within the intent and meaning of the preceding section.”

These provisions, it will be noted, are modeled upon the acts of Congress just mentioned, but enlarge the power by excluding from the limitation not only deposits not bearing interest, but moneys owing to another bank. Sections 11-13 make the bank and non-dissenting directors liable for loans in excess of the limitation. This act thus not only recognizes the power of a bank to pay interest upon deposits, but to borrow from other banks in other ways than by receiving money on deposit from them.

Section 56, of the Ohio “act to incorporate the State Bank of Ohio and other banking companies”; passed

February 24, 1845, 1 Swan & Critch. Rev. Stat. 137, reads as follows :

“Sec. LVI. No banking company deriving any of its powers or privileges from this act, shall at any time be indebted, or in any way liable, to an amount exceeding, if a branch of the State Bank of Ohio, two-thirds, or, if an independent banking company, the whole amount of its capital stock at such time actually paid in, and remaining as capital stock, undiminished by losses or otherwise, except on the following accounts, that is to say :

*First.* On account of its notes of circulation ;

*Second.* On account of moneys deposited with, or collected by, such company.

*Third.* On account of bills of exchange or drafts drawn against money actually in deposit to the credit of, or due to, such company ;

*Fourth.* Liabilities to its stockholders on account of money paid in, on capital stock and dividends thereon.”

The same limitation was incorporated in section 20 of the Ohio “act to authorize free banking”, passed March 21, 1851, *ibid.* 171.

The sections just mentioned are notable as they were familiar to Mr. Chase, who was secretary of the treasury when the National Banking Acts were passed, and largely instrumental in securing their passage, and as their substance was introduced into those acts, as will be noted *infra*. Further comment upon them is postponed until that time.

#### WORKS ON BANKING.

We have already referred to “*Lex Mercatoria*” by Wyndham Beawes. This was a standard work of the last century. Its value survived to this century, for the sixth edition was published in 1813, and edited by Joseph Chitty. In the chapter treating of banks he classifies them according as they are managed by the public authorities, or by

an association in the nature of a joint stock company, or as a purely private enterprise. As to the joint stock banks, he says, page 513 (*italics ours*):

“A second sort of banks is such as consist of a company of moneyed men, who being duly established and incorporated by the laws of their country, agree to deposit a considerable fund or joint stock, to be employed for the profit and advantage of the whole society, in all those ways which are compatible with the nature of such an undertaking; *as borrowing upon their own credit*; and lending money upon good securities; buying and selling bullion, gold and silver, and foreign specie; discounting of bills of exchange, or other secure debts; receiving and paying the cash of other persons; and of this kind is the Bank of England.”

The most valuable and thorough work of this century upon banking as a commercial business is that of J. W. Gilbart, F. R. S., originally published in 1829 under the name of “A Practical Treatise on Banking,” but in more recent editions called “The History, Principles and Practice of Banking.” Mr. Gilbart was probably the most successful and accomplished banker in England of his day. He was the originator, and for many years the manager, of the London and Westminster Bank, the first of the joint stock banks formed in London. In the fifteen years from its organization in 1834 until 1849, under his management, that bank had accumulated a surplus of over half a million dollars, after paying regular dividends at the rate of four, five, and six per cent. Under the leadership of Mr. Gilbart this bank undertook to accept bills of exchange, which led to a contest with the Bank of England as being an infringement upon its vested rights, in which position the latter was ultimately sustained by the House of Lords; see *Bank of England v. Anderson*, 2 Keen, 328; 3 Bing. N. C.

589; and *Booth v. Bank of England*, 2 Keen, 466; 7 Clark & Fin. 509; but this right was subsequently given to the joint stock banks by statute. (See Lawson's History of Banking, 1st American edition, edited by J. Smith Homans, and published by Gould & Lincoln in 1852, pages 183-185). We mention these matters simply to show the very great practical familiarity of Mr. Gilbart with the subject on which he writes. His book has gone through many editions, some of which are quite recent—of itself testimony of the greatest weight as to its value; and it has always been cited with respect and as authoritative by others who have followed him in this field of investigation or in parts of it. From the edition of 1882, revised by A. S. Michie, deputy manager of the Royal Bank of Scotland, we quote as follows:

Vol. I, page 13: "The exchanging of money; the lending of money; the borrowing of money; the transmitting of money, are the four principal branches of the business of modern banking, and in most countries they seem to have taken their rise in the order in which they are here named."

Vol. I, page 23: "That part of the business of banking which consists in the borrowing of money, with a view of lending it again at a higher rate of interest, does not appear to have been carried on by bankers until the year 1645, when a new era occurred in the history of banking. The goldsmiths, who were previously only money-changers, now became also money-lenders. They became also money-borrowers, and allowed interest on the sums they borrowed."

Vol. I, pages 127, 128: "Banking is a kind of trade carried on for the purpose of getting money. The trade of a banker differs from other trades, inasmuch as it is carried on chiefly with the money of other people.

"The trading capital of a bank may be divided into two parts: the invested capital and the banking capital.

The invested capital is the money paid down by the partners for the purpose of carrying on the business. This may be called the real capital. The banking capital is that portion of capital which is created by the bank itself in the course of its business, and may be called the borrowed capital."

"The profits of a banker are generally in proportion to the amount of his banking or borrowed capital. If a banker employ only his real or invested capital, it is impossible he should ever, in the ordinary course of business, make any profits. Bankers can seldom attain more upon their advances than the market-rate of interest; and that may be obtained upon real capital, without the expense of maintaining a banking establishment. If, after deducting the expenses, the profits amount to nothing more than the market-rate of interest upon the invested capital, the bank may be considered to have made no profits at all. The partners have received no higher dividend upon the capital invested in the bank than they would have received if the same money had been laid out in government securities. To ascertain the real profit of a bank, the interest upon the invested capital should be deducted from the gross profit, and what remains is the banking profit."

Vol. I, page 248: "The rediscounting of bills of exchange is an operation of much importance, and has a great influence on the monetary operations of the country. We quote from a former work of our own, *i. e.*, 'The History of Banking in America,' upon this subject: 'Banks situated in agricultural districts have usually more money than they can employ. Independently of the paid-up capital of the bank, the sums raised by circulation and deposits are usually more than the amount of their loans and discounts. Banks, on the other hand, that are situated in manufacturing districts, can usually employ more money than they can raise. Hence, the bank that has a superabundance of money, sends it to London, to be employed by the bill brokers, usually receiving, in return, bills of exchange. The bank that wants money sends its bills of exchange to London, to



be rediscounted. These banks thus supply each other's wants, through the medium of the London bill brokers.' "

(It will be remembered that the bill broker in London is an intermediary between the borrower and the lender. In the cases referred to by the author, he is the chain of connection between the borrowing and the lending banks.)

More than fifty years before Mr. Gilbart first published his book Adam Smith had stated that it was a common thing for the Scotch banks to borrow from their London correspondents when their supply of money was insufficient to meet the demand. We quote from "Wealth of Nations," Book II., c. 2. After stating that the Scotch banks, from an excess of circulation, were obliged to keep an agent at London to collect money for them and send it by carrier, he continues :

"Those agents were not always able to replenish the coffers of their employers so fast as they were emptied. In this case the resource of the banks was, to draw upon their correspondents in London, bills of exchange to the extent of the sum which they wanted. When those correspondents afterwards drew upon them for the payment of this sum, together with the interest and a commission, some of those banks, from the distress into which their excessive circulation had thrown them, had sometimes no other means of satisfying this draught but by drawing a second set of bills either upon the same, or upon some other correspondents in London; and the same sum, or rather bills for the same sum, would in this manner make sometimes more than two or three journeys; the debtor bank, paying always the interest and commission upon the whole accumulated sum."

The "History of Banking," by William John Lawson, was published in London in 1850. It is not an essay upon and inquiry into the business of banking like Gilbart's;



but it fully merits the claim made for it by the author in the preface of "being an extensive collection of facts connected with the banking system," and intersperses those facts with anecdotes of a very entertaining nature. The edition from which we quote is the first American edition, referred to p. 39, *supra*.

In c. 7, "On London Banking," at p. 106 of that edition, the author, having alluded to the superseding of the Jews, the earliest English bankers, by the Lombards, and of the latter in the early part of the seventeenth century by the goldsmiths, and to a change in method by the latter, continues (*italics ours*) :

"The change consisted in the lending of money by the latter on personal credit, and at a moderate rate of interest compared with that charged by their predecessors. They also issued promissory notes, payable on demand *and at fixed periods, bearing interest*. Such notes were called 'goldsmiths' notes.' "

This practice was evidently continued by the Bank of England in its early history, as will appear from *ibid.*, pp. 43 and 44 in c. 4, on the "Foundation of the Bank of England." The statement of the condition of the bank on November 10, 1696, given to the House of Commons and there quoted, and the comments of the author, make this manifest, and show furthermore that the bank was then indebted in 300,000 pounds for moneys borrowed in Holland.

In c. 8, "On Country Banking," at p. 156, the author says :

"Most bankers in the country carry on their business of borrowing or receiving money at interest, as well as lending upon securities, and they thereby form a connecting link in the chain between the operative and inoperative classes; they become the debtors of the capitalists and the creditors of the producers or distributors of revenue, and

thus afford a ready medium of adjustment between the interests of these two great divisions of society."

In c. 11, "On Scotch Banking," at p. 236, the author says :

"All the Scotch banks have an original subscribed capital of their own ; they receive deposits from the public, for which they allow interest, and they issue notes of all denominations from one pound and upwards."

In 1847, there was published in London a book called "Capital, Currency and Banking," by James Wilson, Esq., M. P., being a republication of a series of articles printed in the "Economist" in 1845 and 1847. We quote from article 3, page 26 :

"As a general rule, the independent capital of bankers constitutes but a very small portion of the means upon which they trade. As we have before observed, bankers are rather the medium through whom the capital of others is lent and borrowed than dealers in their own capital. The private and independent paid-up capital belonging to banks may be looked upon rather in the light of a guarantee to the public for their security against the risk which it is known bankers must incur in the use of the deposits placed in their hands, than as constituting any very important portion of their means of trading.

"A banker being essentially, in the first place, a borrower of money, returnable on demand, the great art of his profession is to employ those funds in such a way as will at all times and under ordinary circumstances, enable him to meet such demands."

Page 32: "The practice of banks [in London] not allowing interest on deposits has at length changed the character of the bill-broker to that of a banker, taking deposits (money at call), at a given rate of interest, from one man to lend it by discounting bills at a higher rate of interest to others. At the same time that he acts as a medium

for transferring spare capital which accumulates with banks in one part of the country to those in other parts, where trade and commerce create a greater demand for it."

Also from article 4, page 36. "The business of a banker is to borrow and lend."

G. M. Bell, Secretary of the London Chartered Bank of Australia, has published a little book called "The Philosophy of Joint Stock Banking." We quote from the second edition, published in 1855, from Chapter 10, entitled, "On Rediscounting." After stating that rediscounting is common, and arguing against it as a habit, the author continues, page 69 (*italics ours*) :

"It is well known that banks in the agricultural districts accumulate capital by deposits and circulation, for which they can find no other employment than by sending it to the London bill-brokers, or investing it in the funds. It is equally well known that banks in the mining and manufacturing districts have demands upon them for accommodation out of proportion to their capital, which they can not otherwise supply than by having recourse to the system of rediscounting with bill-brokers. This latter class derive their profits from the difference of interest on the money borrowed and lent between the banks in this way. The borrowing bank, therefore, pays an extra charge, which by a different arrangement might be avoided, and both parties be equally well accommodated. The arrangement here suggested is that *one bank should lend direct to another without the intervention of a broker*. The bank that borrows money from its depositors at two per cent could very profitably lend to its neighbor at two and a half or three per cent, more or less, in proportion to the ever-changing value of money."

In 1885 there was published by John Murray, of London, the second edition of a book called "The Country Banker, His Clients, Cares and Work, from an Experience

of Forty Years," by George Rea, author of "Bullion's Letters to a Bank Manager." We quote from page 218 :

"*Rediscounting*.—The rediscount, or sale of a portion of its bills, is often an important feature in the financing of an English country bank."

The author then proceeds to state some of the objections to this practice, and continues :

"But the objections which apply to banks having ample resources within themselves do not apply to banks placed in districts of great industrial activity, where deposit money is scarce and the demand for loan capital is great. There is nothing opposed to sound banking principle in banks thus placed supplementing their resources by rediscounting portions of their bills, and thus drawing supplies from the London market. A bank, by this process, merely transfers that portion of its discount business to London which is in excess of its local means to meet it."

Mr. Walter Bagehot, in "Lombard Street" (edition of 1873, published by Scribner, Armstrong & Co., N. Y.), says :

Page 243. "A banker's business—his proper business—does not begin while he is using his own money ; it commences when he begins to use the capital of others."

On page 285 he quotes from the testimony given by Mr. Richardson in 1810 to the Bullion Committee of Parliament, as to the nature of an agency for country banks : "It is two-fold ; in the first place, to procure money for country bankers on bills when they have occasion to borrow on discount, which is not often the case ; and in the next place, to lend the money for the country bankers on bills on discount. The sums of money which I lend for country bankers on discount are fifty times more than the sums borrowed for country bankers.'"

On page 287 Mr. Bagehot says : "For the most part agricultural counties do not employ as much money as they

save ; manufacturing counties, on the other hand, employ much more than they save ; and therefore the money of Norfolk or of Somersetshire is deposited with the London bill-brokers, who use it to discount the bills of Lancashire and Yorkshire."

From the quotations we have made thus far from English works it would be inferred that while it was common for the English country banks and the Scotch banks to pay interest upon deposits, and thus hire money in the strictest sense, yet this was unusual among London banks. The latter ceased to be true about fifty years ago, and since then it seems to have been a common thing for even the best managed of the joint stock banks and private banks of London to pay interest upon deposits. To show the present nature of the business of banking as understood in England we quote from the article on "Banking" in the last edition of the *Encyclopedia Britannica* as follows :

"It will be convenient here to give a general sketch of the nature of the business of an ordinary banker. We have said he receives and lends money ; he may receive money either on a deposit or on a current or drawing account. When money is received on deposit it is commonly repayable to the depositor alone, to whom a deposit note or receipt is given ; but it may also be paid to any one to whom the depositor gives an order on the bank either endorsed on the deposit note or receipt or accompanying it. If the banker undertakes to pay interest on deposits, the rate varies according to the length of the notice the depositor agrees to give before withdrawing the money, the ability of the banker to deal with it being, of course, dependent upon the time he may rely upon keeping it. When money is received on a current or drawing account, the customer of the banker draws it out, as he requires, by means of orders, to which the specific name *cheques* is given.

"We have elsewhere hinted at the subdivision of the

business of banking which has accompanied the development of commerce. A banker borrows and lends money, but the conditions under which money is borrowed or lent may be extremely various, and the different classes of bankers are distinguished from one another by difference in the rules which they observe in borrowing or lending. Bankers may borrow on call, at deposit, on debentures, at interest, or without interest, and they may lend on open credits, by discounting bills, by advances on mortgages repayable in installments or otherwise, etc., etc."

The article then specifies as the various kinds of banks: Banks of deposit which borrow upon time certificates bearing interest, of which Land Mortgage Banks, lending on real estate mortgages, and Credit Companies, lending on industrial enterprises, are species; Discount Banks, as to which it says:

"Discount banks and discount agencies borrow money on call or deposit, and lend it exclusively in the discount of bills and negotiable securities, which they often re-discount with capitalists desirous of investing their money in forms capable of being speedily realized."

Trust Companies which borrow on debentures and invest in foreign loans and similar securities; and Savings Banks which gather in the smaller savings of the poor.

After alluding to the fact that the Bank of England does not allow interest upon deposits, and quoting from the evidence of Mr. Weguelin, a former Governor of that bank, before a committee of parliament in 1857 defending this practice, the article comments upon his testimony as follows:

"He says nothing to explain why they," the directors of the bank, "should not, as the managers of a joint stock company, use every means of profitably extending their business, and it is incontestable that if the bank directors

offered to receive deposits at interest, the reputation of the bank would enable them to defy the competition of the other joint stock banks. The truth is, that the non-allowance of interest is a tradition, of no authority in itself, and operating injuriously in keeping up the delusion that the banking department of the Bank of England is an institution differing essentially in the character of its business from other banks."

Turning now to a work written in this country, we call attention to "The Methods and Machinery of Practical Banking," by Claudius B. Patten, of Boston, Mass., published in 1891. From the preface, it appears that Mr. Patten had been for twenty years, prior to 1867, connected with the Suffolk Bank of Boston; that in that year he became cashier of the State National Bank of that city, where he continued until his death in 1886; and that the book is a compilation by his successor of sundry articles published during his life in the *Journal of Banking*.

On page 355 he gives this statement as to the clearing house loans which were such a feature in the case of the *Merchants' Bank v. State Bank*, 10 Wallace, 604:

"LOANS BETWEEN BANKS AT CLEARING.

"In some of our clearing house cities, notably in Boston, the banks are in the habit of borrowing of each other, as their situation may demand, immediately after they have made their morning settlements. These negotiations are, of necessity, made by the representatives of the banks who are present at the clearing. And these representatives are mainly the messengers and settling clerks of the banks, though it has of late years become the custom with many banks to be present at these morning after-clearing negotiations in the person of their cashier.

"This custom has been in existence for at least twenty years, and the aggregate of loans of this class made there daily is very large, ranging from hundreds of thousands to



millions of dollars. I have known many instances where banks, which have emerged from the morning settlements with gains of more than a million, have, before leaving the clearing house, scattered these entire gains in loans among losing banks—loans negotiated on both sides by single representatives of the banks, and those often junior clerks. There is nothing of this sort done in the European clearing houses.

“I found the London bankers interested and astonished to hear that we indulged in financial transactions of this character.

“The loans made at clearing are loans of minute money. They are rarely secured by deposit of collateral of any sort.

“The bank receiving the accommodation draws upon the lending bank a check in its usual form. The loan is charged to it; and, when it is repaid, the lending bank settles the transaction by simply drawing upon the debtor bank for the amount.

“The current rates for these loans are usually about one per cent under those charged upon standard call loans to private bankers and merchants. This is because they are loans for large round sums, ranging say from ten thousand to hundreds of thousands of dollars, and because the money thus advanced is understood to be immediately available in the form of clearing house funds.”

On page 406, he says :

“Shall national banks become dealers in money, or shall they simply bank upon the capital furnished them by their shareholders, unhired depositors, and bill holders? There is no banking question of the period of more vital interest than this, and none which is being more actively discussed.

“There is no doubt but that some of the most successful banks in the United States—banks which have paid the largest kind of dividends, and which to-day show a heavy surplus and a current business of the most profitable charac-



ter—are those which have been run upon a moderate share capital and large interest-paid deposits. These banks have bought money in all directions, paying comparatively heavy prices for it, and have sold the same at a very slight advance. Yet the magnitude of their transactions has so swollen their profits that their small capitals have reaped the largest remuneration. This is doing business on the London joint-stock bank principle—a principle which has in London been worked with marvellous success. The leading London banks in question carry deposits, upon which heavy interest is paid, to the amount of from ten to twenty times their capital. Their dividends have for many years been enormous, and their shares to-day sell, in some instances, at two or three times their par value.

“Banks which deal in money to the extent which I have described and which carry the limited share capital, have need only of making a very small percentage on the money they handle in order to earn a large dividend for their share capital. The motto of such institutions is large sales and small profits, yet the net results are most satisfactory.”

#### JUDICIAL OPINIONS.

Many of the cases in which the power of banks to borrow money has been discussed involved also the authority of the agent through whom the loan was effected. Such cases will be noticed *infra* under other heads of this argument; and to them we refer without repeating here. The cases to which we now invite the attention of the Court are principally those in which it was contended that borrowing was not a legitimate part of the banking business, and therefore, that a bank had no power to borrow money where that power was not expressly given by its charter. This question was presented to the Privy Council in England and to the courts of last resort in New York and Illinois in three cases of great importance. In each of these cases the nature of the banking business and of the

transactions incident to it were carefully examined ; and for this reason they deserve to be stated with some particularity of detail.

The first of these in time is the case of the *Bank of Australasia v. Breillat*, 6 Moore P. C. C. 152, decided by the Privy Council in December, 1847. The facts, so far as necessary to state them for our present purpose, were as follows : The Bank of Australasia was a partnership doing business at Sydney, in New South Wales. The Bank of Australia was a joint stock company, incorporated under a special act, doing business at the same place ; the defendant, Breillat, was the chairman of the Bank of Australia, and the nominal defendant, under statutory provisions, in suits brought against it. The deed of settlement, which constituted the charter of the Bank of Australia, put the control of its business in a board of directors, and declared that business to be the discount and issue of notes and bills, the lending of moneys on securities, and cash accounts for the safe custody of moneys and securities for moneys, for general public accommodation and benefit, and transacting and negotiating all other matters usually connected with the ordinary business of banking ; and by clause 54 it declared the board of directors should have entire control of the lending of money on bills, notes, etc., the purchase and sale of bullion, gold and silver, and such coins and moneys as they might think necessary or advisable, and of calling in all moneys due the company. The Bank of Australia, early in 1843, having become involved in difficulties, applied to the plaintiff for assistance. This was given in the form of a loan of £154,000 sterling upon certain conditions involving, among other things, the winding up of the banking business of the Bank of Australia. In October, 1843, the Bank of Australia gave its demand note for the sum thus lent. In

August, 1844, the share holders in the Bank of Australia declared this note was not binding on that bank, and instructed the directors to defend any action brought to recover on the same. Thereafter this suit was brought upon the note. The committee of the Privy Council who sat in judgment were Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, and T. Pemberton Leigh. The opinion of the committee was delivered by the latter. Having stated the facts and the issue, and described the nature of the powers given to the board of directors, he continues, page 193 :

“ The effect, we think, is to confer on these directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the deed restricting those powers.

“ First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary banks? And, secondly, if so, is there any restriction expressed, or to be inferred, from the deed? ”

Then, having quoted with approval sections 124 and 125 of Story on Agency as to the powers of partners, and having shown that borrowing money for partnership purposes is unquestionably one of those powers, he continues, page 194 :

“ Then, is the nature of a banker's business such as to exclude the power, from want of occasion of its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one of both issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those entrusted to him in discounting bills, in loans, and other modes of investment. It is im-

possible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him ; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may even be impracticable, or the concern must be ruined.

“ We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed.”

The next case is that of *Curtis v. Leavitt*, 15 N. Y. 9, decided in 1857. The case grew out of the failure of the North American Trust and Banking Company, incorporated under the general banking law of New York, passed in April, 1838. This bank, having a paid-up capital of over \$3,000,000, became embarrassed in 1840, and to provide means to meet its obligations issued its bonds in two series, one for one million dollars, and the other for half a million dollars ; each series of bonds was secured by a separate deed of trust conveying specific assets of the company for that purpose. In 1841 the company went into the hands of a receiver, who instituted this suit to declare these bonds and the trust deeds securing them void as being beyond the corporate power of the company, and also as creating a fraudulent preference. The case was argued by some of the ablest counsel who ever practiced in New York, and from the opinions it is evident that it must have been most thoroughly argued and carefully considered. There were five of these opinions, delivered by Judges Comstock, Brown, Shankland, Paige, and Selden. Judges Johnson and Bowen concurred in the opinion of Judge Comstock. Chief Judge Denio did not sit in the case, having been of

counsel. Each of the opinions discusses the nature of the banking business and the powers given by the New York Banking Act of 1838. As those powers were given in language almost identical with that contained in the National Banking Act (the sections are quoted, p. *infra*), the decision is of peculiar importance, for it gave a judicial construction to the statute upon which the National Banking Act was modeled. We shall quote from the language of each of the opinions. (*Italics* ours unless noted otherwise.)

Comstock, J. (p. 51) : "I come next to the objection that banking associations formed under the general law of 1838, have no power to borrow money, and hence that this corporation could not issue its bonds, create the trusts, or give any valid assurance for a loan. This is a very grave proposition, *opposed to the known practice of probably every banking institution in the state*. It should, therefore, be well considered before it is received as the law."

Page 52: "Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.; and in examining the powers of banking corporations, the nature and incidents of banking as a business, when not under special legal restraints, are in the highest degree important. It is true the question will always be one of corporate power rather than of the rules and principles of banking; but those rules and principles may have a decisive influence in the construction of charters which profess to confer powers of this description. And this leads me to observe that banking, regarded as a business and not as a franchise, *includes the borrowing of money as one of its features or incidents*. As no one denies this proposition, I will not dwell upon it further than to quote the remarks of an eminent English judge, Mr. Pemberton Leigh, Chancellor

of the Duchy of Cornwall, in a late case of the Privy Council (*The Bank of Australasia v. Breillat*, 6 Moore P. C. 152, 194)."

He then quotes part of the same passage which we have just quoted from that opinion, and continues (*italics his*) :

"It may be quite material, when we come to examine the general banking act of 1838, to observe now, in passing, that in these observations, so just and forcible, the borrowing of money is spoken of, not as a *distinct department or branch* in the business of banking, but is asserted as the *incident and result* of two of its most important operations, *those of issuing and receiving deposits*."

He then proceeds to show that a banking partnership would undoubtedly have power to borrow money, and that a banking corporation must necessarily have the same power, unless expressly denied,—not as a grant of power, but as an incident to the other powers granted,—and shows that there are no restraints upon the power so long as it is exercised in the course of the banking business. His discussion of this branch of the subject runs from pages 51 to 66.

The parallelism between the language of the New York Act and that of the National Banking Act leads us to quote his remarks on the construction of that act from pages 56–58 (*italics his*) :

"We come then to the question of construction, which to my own mind presents no difficulty. The argument on the other side urges that 'the business of banking' is authorized by the 18th section, only according to the specifications therein contained, among which the power to borrow is not found. To this the answer is, that these specifications, with the *issuing* power granted in the previous sections, cover the whole ground of banking. If the statute had omitted the general terms 'business of banking', and

had merely enumerated the power of issuing, and all the others named in the 18th section, that would have been a general grant of banking powers, including, as their incident, the right to borrow money when a necessity may arise in the exercise of those powers.

“To deny this conclusion is necessarily to assume (and it seems to be assumed, perhaps unconsciously) that borrowing is an independent operation in the business of banking; in other words, that it is banking in one of its branches, and hence that the power can not exist without a particular specification. This is, I think, plainly an error; and yet it appears to lie at the foundation of the opposing view of the present question. Now, in a very simple and elementary view of the subject, borrowing is not banking, nor is it in a just and proper sense any other kind of business. It is the incident and auxiliary of various kinds. Let us test this. If a person should open and keep an office for receiving deposits payable on demand, he would carry on a well known branch of banking business, although he might use the deposits in speculation or other modes totally unconnected with banking. He would be a banker. So if he were to keep an office for issuing his own circulating notes, or for dealing in exchange, or for discounting bills, and should actually carry on either of those operations without the others, he would exercise a banking power, although confined to a single one. But suppose he keeps an office and habitually borrows money on time, which he uses in manufacturing or some other branch of industry; was it ever supposed that such a practice made a man a banker? In truth he performs neither a banking nor a manufacturing operation, but one which is simply auxiliary to the business in which he is engaged. A banking corporation, therefore, when it borrows money, exercises an incidental and auxiliary power, not expressed, but implied from those which are expressed. On this ground the English Privy Council proceeded in the case of the *Bank of Australasia v. Breillat* (*supra*), as will be seen in the extract quoted above from the opinion in that case.



The right to borrow was not among the specifications in the deed, but was referred to the powers of issuing and of receiving deposits, which were specified. If these views are correct, they would seem to be decisive, for in the act of 1838 all known express banking powers are enumerated.

“The course of bank legislation in this state leads to the same conclusion. In the charters prior to 1825 there was no enumeration of the banking powers, but in that year the Commercial Bank of Albany was chartered, ‘with all incidental and necessary powers to carry on the business of banking, by discounting bills, etc.,’ proceeding with the same specifications as in the act of 1838, now under consideration. This was the model of a vast number of charters down to and including the year 1836, when special legislation of this kind ceased. Now, it is a fact not at all remarkable, but very pertinent to the present question, that in no special bank charter ever granted in this state was it thought of to specify the borrowing of money as one of the substantive and express banking powers. Yet I am not aware that it was ever before suggested that the right to borrow was excluded by the enumeration of those powers. Those specifications were evidently intended not to restrict the appropriate business of banking, but as a mere legislative definition of that business; a definition not indispensable, perhaps, but eminently useful, because it left nothing to construction or in doubt. Even the restraining laws may be referred to in corroboration of these views. Corporations, not expressly incorporated for banking purposes, were prohibited from exercising banking powers under a specification precisely like that found in all the special bank charters and in the general charter of 1838. (1 R. S. 712, secs. 3, 6.) Indeed, it would be difficult to conceive a greater absurdity than a prohibition against borrowing money in a statute intended merely to restrain unauthorized banking.

“Again, suppose a corporation were chartered under a special or general law for manufacturing purposes, with a particular authority to borrow money whenever deemed



necessary in the business : would that be considered a grant of one of the banking powers? Plainly not ; and quite as plainly it would be, if the authority were to receive deposits or discount bills, or issue circulating notes."

The opinion of Brown, J., commences on page 133 ; that part of it which relates to the borrowing power begins on page 156. Having stated that the power, if given, is implied and not expressed, he says (p. 158) :

"Whatever incidental power is a necessary and appropriate method to enable a banking institution to carry on the business of banking in the manner, to the extent, and with the means contemplated by the act of 1838, is as clearly within the terms of the grant as if it had been specifically mentioned. Before we can say, with any assurance, whether the power to borrow money is to be implied, we must look at the acts under which the associations are created, and see the nature of the business in which they are to embark, the usual and customary modes in which it is conducted, the instruments and resources with which they are to be furnished, and the emergencies and hazards to which the business is necessarily exposed. Banking is a system of credits. Its circulation is upon credit, it receives deposits upon credit, and if it deals in exchange, either domestic or foreign, that, too, is upon credit, more or less. It discounts bills and notes upon the faith and credit that its circulation will not be suddenly returned for redemption, or its deposits suddenly withdrawn. It is thus that it multiplies its capital and realizes its profits. Take away its power to use its credit, and confine it to the use of its capital alone, and its business would perish."

Page 160 : "The right to raise money by loan for a legitimate end must exist as one of the incidental powers of the corporation, because its exercise may be indispensable to the preservation of its credit and the successful prosecution of its business. . . . So long as power is given to employ credit, as the basis of discount and circulation, the

power to borrow must be implied, or the business can not be usefully or successfully conducted. To refuse to recognize it as one of the powers conferred by the statute, is to withhold from the banking institutions a function necessary to their existence."

The opinion of Shankland, J., begins upon page 164, and that part of it relating to this question will be found on pages 164-171. Having shown that in the idea of a bank deposit there is nothing but a loan by the depositor to the bank, he continues (p. 166):

"In this last and widest acceptation of the term *deposit*, it was most probably used by the legislature of 1838; for it was well known in all commercial communities, at that period, and to all competent legislators, that *borrowing money to lend again is a part of the legitimate business of banking*. A banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. (Gilbert's Pr. Obs. on Banking, 25; 1 McCulloch's Com. Dic. 86-117.)

"I am unable to perceive any reasons of policy to deny to the banks the privilege of incurring obligation by way of loan while they can incur the like obligation by taking in deposits. In truth, the obligations we have seen are the same, except in name."

Page 169: "Although the power to borrow money may be justly predicated on the express power to receive deposits on the principles of construction above indicated, or may be found amongst the mass of unenumerated, incidental, and necessary ones, I prefer to put my opinion upon the broad ground that every corporation, unless prohibited by law, can incur obligations, as a borrower of money, to carry on the legitimate business for which it was incorporated, although not specially authorized to borrow by its charter. Such has been the uniform language of the courts in this country."

The opinion of Paige, J., begins upon page 182; that part of it relating to the borrowing power will be found on pages 209-222. On page 210, he says :

“The power of the North American Trust and Banking Company to borrow money may be maintained as an incidental power necessary to carry on the business of banking. This power has always been claimed and exercised by banks of discount in all commercial countries. In the original charter, granted in 1694 to the Bank of England (Act of 5 and 6 William and Mary, ch. 20) the power of that bank to borrow, as an incidental power, was conceded by imposing a restriction in respect to the amount to be borrowed. The same concession was made by the enactment of the several acts of the British Parliament, restraining in favor of the Bank of England, all corporations, etc., from borrowing money on their notes, payable at a less time than six months. The Scotch banks exercise this power. It is one of the principal sources of their profits, to borrow at a low rate of interest, and lend at a higher. (3 Edin. Encyclo., tit. Bank, 220, 224; Cyclopædia of Arts, etc., tit. Bank; 1 Chitty on Bills, 15, 16.) . . . This power was always exercised by the old incorporated banks of this state, and it has also been exercised by the banking associations since the passage of the act authorizing their formation. It has been exercised by these banks as a legitimate power of banking, and as the necessary and usual means to enable the banks to carry on the business of banking.”

Page 214: “The exercise of the power to borrow money is usual in the course of the ordinary business of a bank; and it is directly and immediately appropriate to the execution of the expressly granted powers.”

While Judge Selden differed with his colleagues as to the authority of the North American Trust and Banking Company to issue the securities in question, he expressly concedes that borrowing is an ordinary incident of the

banking business, his language upon that subject being as follows (pp. 255, 256) :

“The receiver’s counsel takes the broad ground, that banking corporations can not borrow money, or at least, that they can not borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes can not properly exercise. This position is not supported by any direct authority; and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it can not be sustained. It is not in harmony with the present practice or the past history of banks.”

Then, after referring to the practice of the English country banks and the Scotch banks which has been mentioned in the citations above made, he continues :

“It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question, were *ultra vires*, can not be sustained on the ground that borrowing is no part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the general banking law itself.”

The conclusions of the whole Court are set forth in fourteen propositions, stated on pages 294–297. Of these, the fifth, Judge Selden dissenting, declares that the North American Trust and Banking Company had power to borrow money and to issue time paper to secure a debt for moneys loaned. In *Barnes v. Ontario Bank*, 19 N. Y. 152, 156, this conclusion was re-affirmed as settled law without dissent from Judge Selden.

The last of the three cases mentioned above is *Ward v. Johnson*, 95 Ill. 215, decided in May, 1880. There a corporation called the Farmers', Merchants', and Mechanics' Savings Bank had all the powers ordinarily given to a commercial bank, and, in truth, was such, as stated by the Court on page 243, though styled a savings bank. This corporation established what it called an investment department, whereby certificates were issued for sums of one hundred dollars and upward, bearing interest at seven and three-tenths per cent per annum, secured by a deed of trust whereunder certain specific property of the corporation was put into the hands of trustees. The corporation also did a general banking business. The bank having failed and been put into the hands of a receiver, it was contended, as in the case of *Curtis v. Leavitt*, 15 N. Y. 9, that these certificates were invalid because given for borrowed money. On pages 237-239, the Court speaking through Mr. Justice Scholfield, after reciting the powers of the bank, say:

"In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money." . . .

"The corporation was authorized to contract and agree with persons desiring to make deposits or loan money, as to the terms. . . . The business is simply that of a bank obtaining money, and, so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary."

In *Planters' Bank v. Sharp*, 6 Howard, 301, this Court had occasion to consider a subject so nearly allied to the one under consideration as to be almost, if not quite, iden-

tical in its legal bearings ; and although the matter did not then pass into judgment because the Court preferred to rest its decision upon another ground, yet the opinion of the Court was so expressed as to leave its conclusions not open to doubt. The exact question there involved was whether the Planters' Bank had power to rediscount its negotiable paper. The majority of the Court held this power was given to it by the 6th section of its charter empowering it "to grant, demise, alien, or dispose of for the good of said bank" its "goods, chattels and effects," the 22nd section further providing that the bank should not "discount any note or notes which shall not be made payable and negotiable to said bank." While resting the decision on the express power thus given the Court further considered the nature of the banking business, and in no uncertain terms made clear that in their opinion rediscounting was but an incident of the business of banking ; that it was the duty of the bank "to pay in some way every debt ;" and that rediscounting was but a means to that end. Further they say (p. 323) :

"It is said, in opposition to this, Why should a bank be considered as able to incur debts ? or, why to do any business on credit, requiring sales of its notes or other property to discharge its liabilities ? Such inquiries overlook the fact, that the chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates, or bank-book credits to individuals, are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank-notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge."

As we have stated, rediscounting is so closely analo-

gous to borrowing that it is difficult to conceive of a course of reasoning which should sustain the one and deny the other as an incident to the banking business. The same necessity which would call the one into action would equally demonstrate the necessity for the other. Which should be adopted is simply a matter of choice for the particular bank, having in view its condition at the time action becomes necessary.

As we have quoted statutes from Massachusetts and Ohio showing the power of banks organized under the general laws of those states to borrow money, it seems proper to insert here references to decisions from the Supreme Courts of those states upon the same subject.

It came before the Supreme Court of Massachusetts in *Commonwealth v. Bank of Mutual Redemption*, 4 Allen, 1. Besides the statutory provisions above mentioned, others were then in force by which banks were prohibited from making contracts in any form "for the payment of money at a future day certain, or with interest, except for money borrowed of the state," or of a state savings bank, or money deposited by an assignee for creditors, "and except also that all debts due to one bank from another, including bills of the bank indebted, may draw interest." There was also a penalty imposed upon a bank which issued notes with a stipulation that they should not be put into circulation or returned to the bank for a certain time. Under these statutory regulations the defendant borrowed \$40,000 from another bank, payable four days after date, and gave to that other bank \$40,000 of its bank notes, with the agreement that they should not be put into circulation or returned within the four days. The state bank commissioners filed their petition to enjoin such actions, and some others which it is not necessary to mention as they relate to another sub-



ject, alleging them to be violations of the statute ; and the cause was heard upon a motion to dissolve an injunction granted upon that petition. With reference to the matter of borrowing money the Court said, p. 14 :

“The right of a bank to borrow money from another bank is nowhere expressly prohibited. On the contrary, the right to do so would seem to be recognized in Gen. Sts. c. 57, sec. 26, by which it is expressly provided that debts due from one bank to another, including bills of the bank indebted, shall not be considered as within the prohibition of sec. 25, which limits the indebtedness of a bank to twice the amount of its capital stock, exclusive of sums due for deposits not bearing interest. The only restraint on the power to contract such a debt is contained in sec. 63 of the same chapter, which provides that no bank shall make any contract for the payment of money at a future day certain, or with interest. This language is certainly broad enough to cover a contract by one bank with another to pay money at a future day. That it was intended to include such contracts is strongly implied from the exception to the prohibition, by which it is provided that ‘all debts due to one bank from another may draw interest.’ The conclusion would seem to be inevitable that the legislature, in making this provision, had in view debts due from one bank to another, and intended to bring them within that part of the section which prohibits them from being made payable on time, but to exempt them from the prohibition of drawing interest. We can see no sufficient reason for limiting this exception to any particular class of debts existing between banks. It is applicable to every species of indebtedment which may lawfully be due from one bank to another. . . . So far, therefore, as the defendants entered into contracts by which they borrowed money of another bank payable at a fixed time, they violated the law ; but beyond this the allegation in the information setting forth that they borrowed money of other banks payable with interest, in violation of the statute, is not sustained.”



In *Sturges & Co. v. The Bank of Circleville*, 11 Ohio St. 153, the question involved was not so much the power of a bank to borrow money as its power to guarantee payment of a bill of exchange sold by it, and of its cashier to act for it in giving such guaranty. But in deciding this, the power to borrow, and that through the cashier, was assumed as a premise undisputed, and upon which the conclusion of the existence of the power in the case under consideration could be built. The Court say, p. 167 (*italics ours*):

“But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, *as well as to that of borrowing money*, as the agent of the bank. In the discharge of his duty, he is supposed to be instructed and directed, either generally or specially, by the bank, either through its board of directors or president, as the case may be.”

We also add the case of the *National Bank of Commerce v. National Bank of Missouri*, 30 Fed. Cas. 1121, Case No. 18,310, where the power of a national bank to borrow money was considered by Judge Dillon in October, 1878, in the Circuit Court of the United States for the District of Missouri. The action was at law, the plaintiff being a bank of New York and the defendant one of St. Louis, to recover \$400,000 and accrued interest, being the balance due upon a loan of \$1,000,000 made by the plaintiff to the defendant. The defendant bank had suspended in June, 1877, and a receiver had been appointed by the comptroller. The plaintiff's claim was presented to the receiver, and disallowed on the ground that the money was not borrowed by the bank, but by its directors for their own benefit. In

defense to the action it was also contended "that the defendant had no right to borrow money to loan again, and that a loan of this character was illegal and known to the plaintiff to be illegal when made." The defendant having admitted at the trial that the plaintiff was entitled to recover, unless one of the two defenses above mentioned was established, assumed the burden of proof. At the conclusion of its evidence the plaintiff moved for peremptory instructions in its favor. In granting this motion, Judge Dillon said with reference to the defense of lack of power :

"I am of opinion that a national banking association has, under the national banking act (13 Stat. 99), the power to borrow money, and that the defendant bank, in the absence of fraud brought to the knowledge of plaintiff bank, had the power to enter into the contract of December 26, 1866, which is the foundation of this action. The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon an actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of lending the same, either by discounting the notes, bills, etc., of others or on personal security, with a view to profit by the transaction. The loan of money to a national bank is not invalid because the lender may know or have reason to believe that the borrowing bank intends to lend it, when received, to others. A national bank may lend its money to its directors as well as to other persons, provided it acts in good faith and does not exceed the limitation to any one person or director of 'one-tenth part of the amount of the capital stock of the association actually paid in.' There is no claim that the limitation was exceeded in this case, as the capital stock of the bank was \$3,410,000 actually paid in. If the law were that a national bank could not borrow money for the purpose of lending the same again to its

directors, and that if the lender knew that such was the purpose of the borrowing bank, the transaction would necessarily be invalid, I admit that the evidence in the case is such as to justify the court to submit the question of the plaintiff's knowledge of such a purpose to the jury. But I am of the opinion that where no fraud is intended a national bank may lend its money to its directors, and the fact that the lender knows, or has reason to believe, that when the money he lends is received it will be lent to the directors, does not, unless he knows, or has good reason to believe, that a fraudulent use or disposition of it is contemplated by the directors when received, invalidate the transaction. The directors had no more power over the \$1,000,000 obtained under the contract in suit than they had over the \$1,000,000 which the defendant bank had on ordinary deposit with the plaintiff bank, or over the \$3,000,000 of capital actually paid in. A lender can not knowingly aid an intended fraud, but he is not required not to lend because the borrowing bank may misuse their powers."

Upon the other defense he held that the evidence did not tend to show that the plaintiff was cognizant of any intended fraud.

The jury having returned a verdict in favor of the plaintiff for \$445,582, under the instructions of the Court, and judgment having been entered thereon, a writ of error was afterwards sued out to this Court, as stated in the foot-note to the report. But as the files of this Court show this writ was subsequently dismissed under a stipulation of counsel, the judgment thus rendered was ultimately acquiesced in.

As stated above, other cases illustrating the judicial recognition which has been made of the power of banks to borrow money, will be mentioned later in discussing other propositions. To these we refer now, without stopping to quote from them. Indeed, after a thorough search, we

can say that we have found but one case or reference thereto, aside from the decision in the case of the *Western National Bank v. Armstrong*, wherein it was intimated that borrowing money was not an ordinary incident of the banking business. That single instance is the decision of Judge Blodgett, of the Northern District of Illinois, in the case of *Adams v. Cook County National Bank*. His opinion seems never to have been printed; at least, we have been unable to find it, and it has escaped the vigilance of the editor of the new series of federal reports, known as "Federal Cases." Wherever it is mentioned, reference is made to Ball on National Banks, page 54, a work published in 1881, as the primary publication. The opinion is there stated to be in manuscript, and nothing is given to show the nature of the case, what questions were before the Court, or whether the language upon this subject was decision or *obiter*. All that is said is the following:

"The power of a national bank to borrow money or to give notes is neither expressly nor impliedly given by the act. The business of the bank is to lend, not to borrow money; to discount other's notes, not to get its own notes discounted. A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money. The burden of proof in such cases would be upon the lender."

#### EVIDENCE OF PRESENT USAGE.

It was shown by the testimony of seven experienced bankers of New York and six of Cincinnati that prior to the decision of this Court in the *Western National Bank* case it was an ordinary and usual incident in the banking busi-

ness for one bank to borrow from another ; that by custom and usage it was within the scope of the authority of each of the executive officers of a bank—president, vice-president if actively engaged in the conduct of the bank, and cashier—to make application for such a loan ; that they were never required to furnish any proof of their authority to make the application either in the form of a resolution of the board of directors of the borrowing bank or otherwise ; and that the loan would be made either by rediscounting the negotiable securities offered by the borrowing bank (as was done in *Auten, Receiver, v. United States Nat. Bank*, No. 206 of this court's docket, October term, 1898), or by discounting the note of its officers (as was done in *Scott v. Armstrong, Receiver of Fidelity Nat. Bank*, 146 U. S. 499), or its own note, or by a mere credit (as in the case at bar), upon the faith of the correspondence, sometimes fortified by the note or certificate of deposit of the borrowing bank. When the transaction was not a rediscount, the borrowing bank usually gave collateral security,—which produced the same result ; and the proceeds in either case were, as in the case at bar and others above mentioned, credited to the borrowing bank in its account with the lending bank upon the books of the latter, so that they could be drawn out only by checks of the officers of the borrowing bank in the regular course of business.

This testimony was summarized in the opinion of the Court below (Rec., pp. 334–337), and is absolutely contradicted. We shall not undertake, therefore, to quote it *verbatim*, but shall content ourselves with giving the names of the witnesses, with a statement as to their experience and a reference to the pages of the record where their evidence begins, and with quotations from two of the witnesses of each city as to the commonness of such transactions. The witnesses upon the subject were : M. M.

WHITE, an officer for the last twenty-one years of the Fourth National Bank of Cincinnati as cashier and president (Rec., p. 165); W. S. ROWE, engaged in banking business in Cincinnati for twenty-two years, and a cashier since 1881 (Rec., p. 186); H. C. YERGASON, who has been continuously for twenty-eight years cashier, vice-president, and president of the Merchants' National Bank of Cincinnati (Rec., p. 192); G. P. GRIFFITH, cashier and vice-president continuously since 1866, and for three years prior to that time assistant cashier (Rec. p. 195); J. D. HEARNE, president of the Third National Bank of Cincinnati since January 1882, and for eleven years prior to that president of banks in Covington, Kentucky (Rec., p. 200); WM. A. GOODMAN, a cashier, vice-president, or president ever since 1858 (Rec., p. 184)—all of the above being of Cincinnati; also the following of New York City: WM. J. QUINLAN, cashier since 1878 of the Chemical National Bank (Rec., p. 121); GEORGE G. WILLIAMS, cashier of that bank from 1855 to 1878, and since then its president (Rec., p. 129); DUMONT CLARK, with the American Exchange National Bank as assistant cashier, cashier, vice-president, and president, since 1868 (Rec., p. 134); A. P. HEPBURN, superintendent of the Bank Department of the State of New York from 1880 to 1884, then national bank examiner for over three years, comptroller of the currency from 1889 till 1893, and then president of the Third National Bank of New York City (Rec., p. 136); EDWARD TOWNSEND, cashier of the Importers' and Traders' National Bank for over fifteen years (Rec., p. 148); GEORGE F. BAKER, president of the First National Bank of that city, and connected with it for over thirty years as teller, cashier, and president (Rec., p. 150); and FREDERICK D. TAPPAN, cashier of the Gallatin National Bank for eleven years, and then its president for twenty-seven years (Rec., p. 151).

M. M. WHITE says (Rec., p. 165) :

"Q. 6. Mr. White, can you tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of the *Western National Bank v. Armstrong, Receiver of the Fidelity National Bank*, in the spring of '94, it was considered an unusual or a usual thing for one bank to borrow money from another?

"A. It was a usual occurrence for them to do so ; being regarded as legitimate in the line of banking business."

(Rec., p. 168.) "XQ. 3. What kind of loans do you refer to, Mr. White, as ordinary loans?

"A. Well, where a bank is short in money, and long in bills, as frequently occurs, it is legitimate and proper to discount those bills and build up the cash of the bank. It is not an unusual thing for a bank to discount freely in anticipating the withdrawal of deposits. You can't pay a check with notes ; and the only thing to do, where you are long on bills and short on cash, is to discount these bills—lessening your bills receivable, and thereby increase your cash ; which I refer to as legitimate banking."

W. S. ROWE says (p. 187) :

"Q. 13. Mr. Rowe, was the borrowing of money by one bank from another an extraordinary thing in the banking business?

"A. No ; the country banks often did it—borrowed from us.

"XQ. 1. Mr. Rowe, what proportion of these cases was the rediscount of paper loaned [owned?] by the bank?

"A. It was pretty hard to tell. Probably fifty to sixty per cent of it."

"XQ. 2. And then nearly half of it was actually loaned?

"A. Yes. Some of the country banks buy the securities of their own cities, or towns, or counties, and hold them to get money on, really, at certain seasons of the year when they need it, because those securities are better known. It is a class of securities that is better



known in the city than the paper they get, especially in the farming communities."

(Rec., p. 191.) "RDQ. 19. You spoke to Mr. Herron here about country banks borrowing money, Mr. Rowe. What class of banks do you designate as country banks?"

"A. Banks in small places; the cities in the South, for instance; there are certain seasons of the year, during the moving of the crops—the cotton crops, for instance—when they need money to move the crop, and the banks borrow moneys to let their customers have, to move the crops. And the banks up in Ohio, in the agricultural districts, borrow money at certain seasons; up in the large wheat and corn countries; their customers will want money to buy cattle and stock with; and they frequently want more money than the country bank has, and we loan them the money on their municipal or other bonds, and carry the transaction until the crops or cattle are sold."

DUMONT CLARKE says (Rec., p. 134) :

"Q. 8. Prior to the decision of the *Western National Bank* against *Armstrong*, by the Supreme Court of the United States in the spring of 1894—if I recollect right—was it, or was it not, a usual thing for a bank to borrow money?"

"A. Yes, sir; very common occurrence.

"XQ. 1. In what shape was this borrowing made?"

"A. Usually in the light of rediscounting the bills receivable; at times, however, collateral was furnished to us.

"XQ. 2. What evidence of such indebtedness was it usual to take?"

"A. Simply the paper which they had discounted with the indorsement of the bank upon its back; at other times we would take a collateral note made by the bank; at other times a certificate of deposit made by the bank—in the last two cases collateral would be attached to such instruments."



A. B. HEPBURN says (Rec. p. 137):

“Q. 9. Do you know whether or not it was a usual thing for banks to borrow money from other banks prior to the decision by the Supreme Court of the United States in the spring of 1894, in the case of the *Western National Bank* against *Armstrong*?

“A. I do. It was usual.”

This evidence is confirmed by information to be gathered from the reports of the Comptroller of the Currency to Congress, which, though they are not embodied in the record, will receive judicial notice because they are reports of a principal executive officer made to Congress pursuant to law. Rev. Stat. of U. S., sec. 333; *Heath v. Wallace*, 138 U. S. 573-584. On page 115 of vol. 1 of the Comptroller's report, made December 4, 1893, is given a consolidated statement of the conditions of national banks on October 3, 1893, from which it appears that the notes and bills rediscounted by banks in reserve cities other than New York, Chicago and St. Louis, as shown by the returns to the Comptroller, amounted on that day to \$3,137,972, and their bills payable to \$10,556,104; and that in the national banks not in reserve cities the notes and bills rediscounted then amounted to \$17,928,765, and their bills payable to \$16,628,834. On pages 254-275 of the same report will be found consolidated statements of the national bank returns to the Comptroller of the Currency for every year from 1863 to 1893, inclusive. Prior to 1869 notes and bills rediscounted, and bills payable, were not separately itemized, but in that year the separation began; and it will be seen that thereafter the amount of each item was never less than one million, and was generally several millions of dollars. During the years 1886 and 1887, which we choose because nearest to the transaction in question, the amount

of notes rediscounted ranged from \$7,556,837.10 to \$17,312,806.39; and the bills payable from \$1,145,240.26 to \$5,105,112.57. The amount of these loans afterwards greatly increased, with some fluctuations, until in July, 1893, it came to more than *sixty millions of dollars*, which was in round numbers ten per cent of the entire capital stock, forty per cent of the entire circulation, four per cent of the entire individual deposits, and three per cent of the entire loans and discounts, of all the national banks then reporting. This statement alone seems sufficient to show that borrowing money otherwise than by circulation or deposit is a normal and usual feature of the banking business. It is a standing resource of which banks avail themselves, as a matter of course, where profit offers, or occasion justifies their so doing.

To sum up the historical and oral evidence we have adduced, the very essence of the banking business, the corner-stone upon which it is built, is the power and ability to borrow money. As Professor Dunbar says (Chapters on Theory and History of Banking by Charles P. Dunbar, Professor of Political Economy in Harvard University, p. 24): "The bank being then obliged to extend its operations beyond the amount of its capital, is compelled for this purpose to make use of its credit. In fact, it is only by such a use of its credit that the establishment becomes in reality a bank." When it issues its circulating notes it borrows money. When it receives money on deposit upon a drawing account, again it borrows money. When instead of creating a drawing account it gives to the lender a certificate of deposit, again it borrows money. When it sells exchange, its own draft upon its correspondent in a different place, again it merely borrows money. Its sole aim and object is to borrow money that it may make a profit by lending it again.

From the beginning of the history of incorporated banks this feature of their business has been recognized. They have borrowed, and have been authorized to borrow, with interest as well as without; on time as well as on demand. Borrowing being the essential feature of a bank's existence is incidental to that business in all its branches. The terms on which the loan is made are matters of indifference in the absence of statutory prohibition; they become simply a matter of discretion as to the best method of conducting the business. And so, while some banks decline to pay interest upon deposits, others deem it to their advantage to swell their deposit accounts by allowing interest. In this lies the solution of the question we are concerned with. It is merely whether a bank in the ordinary conduct of its business may hire money, may pay to him who lends—for it always borrows—a consideration for the lending other than the mere promise to repay. We submit there can be but one answer to this question. The object of banking being to make profits by lending money, it is simply a question for the managers of the bank as to whether the greater profit will be reaped by hiring money than by confining itself to the use of that which demands no reward other than the promise of repayment.

At some times and in some places the money borrowed by the banks from their depositors without interest can all be lent again to their customers. But this is not always the case. At times more money is so deposited that the bank can lend again to those doing business with it; in such case the money borrowed by it must lie idle or seek some other than the usual channel of use. At other times, the money so deposited is not sufficient to meet the legitimate demand upon the bank for loans; in such case it must hire money elsewhere, or forego a legitimate profit within its reach. The situations just depicted are not ex-

traordinary, but normal, in certain places ; that is to say, agricultural communities have ordinarily a glut of money deposited in the banks, while manufacturing communities have ordinarily an excessive demand for loans from the banks—excessive in the sense that the demand for loans in a community exceeds the money deposited by that community. Again, in agricultural communities in this country, as is well known, there is a certain season when the amount of money there circulating is insufficient to transact the business ; at that season, known as the time for “moving the crops,” the banks in agricultural communities must seek other funds than those lent to them by their own depositors. Hence it comes about that banks in the regular, ordinary, legitimate course of their business have occasion to borrow, and do borrow, money from other banks. At one point the demand for money is slight ; at another it is great. The bank at the latter borrows from the bank at the former, and the equilibrium is restored. This borrowing may be by giving what is primarily the obligation of the borrowing bank, or by rediscounting notes it has already discounted. In either case the result is the same. Money is borrowed which the borrowing bank obligates itself to repay.

To say, therefore, that borrowing money is not a legitimate part of the banking business, is utterly to misconceive the nature of that business. The very breath of a bank's life depends upon its power to borrow money. That power failing, either from legal disability or from financial distrust, the bank is doomed. Able to borrow, it is able to lend again and to make money. If it pay interest to depositors, it may secure a larger volume of deposits, do a larger volume of business, and make larger profits. And if it may borrow at interest from one person or class to swell its deposit account, or the funds usable for its busi-

ness demands, it may from another. How it borrows and whence it borrows are not material; it matters not whether it borrow on deposit credited to the lender upon its books, or on its note or indorsement which the lender takes with him, or on its assurance, written or verbal, that the money will be repaid; all come to the same end. The essence is, the bank must borrow that it may lend again.

## II. NATIONAL BANKS AUTHORIZED TO BORROW.

It remains to consider whether there is any thing in the National Banking Act which prohibits associations organized thereunder from exercising this power of borrowing, which we have seen to be incidental to the banking business, or limits it in such a way as to defeat the loan involved in the case at bar.

The national banking system was inaugurated by the act of February 25, 1863, 12 U. S. Stat. at Large, 665. The general powers granted to associations formed under that act are stated in sec. 11. We have said that this part of the present National Banking Act, of which that section was the prototype, was adapted from the New York General Banking Act, c. 260 of the laws of 1838; the analogue of sec. 11 of the act of 1863 is found in sec. 18 of the New York act. To show the closeness of the adaptation we shall make one quotation serve for both, words found in this portion of sec. 11 of the Federal act of 1863 and not in sec. 18 of the New York act being printed in *italics*, and words found in the New York act and not in the Federal act of 1863 being enclosed in brackets.

Each provides that associations organized thereunder "shall have power to carry on the business of banking, *by obtaining and issuing circulating notes in accordance with the provisions of this act*; by discounting bills, notes, and other

evidences of debt ; by receiving deposits ; by buying and selling gold and silver [,] bullion, foreign coins, and bills of exchange, *by loaning money on real and personal security*, in the manner specified in their articles of the association, for the purposes authorized by this act ; [by loaning money on real and personal security ;] and by exercising such incidental powers as shall be necessary to carry on such business."

The act of 1863, not proving sufficiently attractive to banking capital, was remodeled by the act of June 3, 1864. 13 U. S. Stat. at Large, 99. Sec. 8 of that act was the equivalent of sec. 11 of the preceding act. The subject embraced within the provision above quoted was embodied in the subsequent revision of the United States Statutes as the seventh clause of sec. 5136. Some slight changes were made in that revision, and to show these, as well as to make the history complete, we again make one quotation serve for both, printing within brackets such words as are found in the Revised Statutes which were not in the act of 1864, and in *italics* those which were in the act of 1864, and not in the Revised Statutes.

Such association "*may* [shall have power] . . . [Seventh—To] exercise *under this act* [by its board of directors, or duly authorized officers or agents, subject to law,] all such incidental powers as shall be necessary to carry on the business of banking [ ;] by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt ; by receiving deposits ; by buying and selling exchange, coin, and bullion ; by lending money on personal security ; [and] by obtaining, issuing, and circulating notes, according to the provisions of this *act* [Title]."

As the act of 1863 follows almost *verbatim* the New York act of 1838, it must be presumed that Congress in adopting the latter act adopted also the well known and

settled construction which, in *Curtis v. Leavitt*, 15 N. Y. 9, and *Barnes v. Ontario Bank*, 19 N. Y. 152, 156, had previously been given to it by the Court of Appeals of New York; *McDonald v. Hovey*, 110 U. S. 619, 628; *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295. The act of 1864 and the Revised Statutes have inverted the order of the phrases, and have placed the grant of incidental powers at the beginning instead of at the end of the clause; and in the revision a confusing semi-colon was inserted after the word "banking". It needs but little reflection to satisfy the mind that these changes do not signify a change of meaning.

In the first place, as to the change in punctuation, it is a well-known rule that punctuation neither makes nor mars a statute; *Hammock v. Loan and Trust Co.*, 105 U. S. 77, 84. Particularly is this true when the statute is but a revision of previous enactments; *United States v. Le Bris*, 121 U. S. 278; *United States v. Lacher*, 134 U. S. 624.

In the second place, the act of 1864 was, so far as this branch of it was concerned, manifestly but a revision of that of 1863; and the rule just referred to as to the construction of revising statutes applies as well to a mere change of order as to change in punctuation.

Again, to suppose that the change of order signified a change of construction would be to affirm that the specific powers mentioned were themselves incidental to the business of banking, and, in grammatical phrase, were used in the act of 1864 as in apposition to the words *incidental powers*. But these powers specifically named are not incidental to the business of banking; they are themselves different branches of that very business. An institution may be a bank by having one or more of these powers and without having all of them; but if it have none of them, it can not be a bank. A bank may be a bank of discount, or

of deposit, or of exchange, or of circulation ; or it may have all of these powers or only some or one of them. In each case, with the specific grant of power denoting the kind or species of banking business it is to do, would follow the power to do all things incidental to that kind of banking business. The act of 1864 therefore does not differ in legal effect from that of 1863. In each case associations were authorized to do the various kinds of banking specifically named, and all other things that would be incidental thereto. By the change of order it was not intended to signify that the principal was considered as merely an incident, and to limit the powers given by the act of 1863 to the measures specifically named in that act and in the act of 1864.

This conclusion, reached from consideration of the subject-matter and the words used, is confirmed by the proceedings in Congress during the passage of the act of 1864. As already stated, the act of 1863 had not accomplished all that had been desired. The reports of the Comptroller of the Currency show that by April 4, 1864, only 307 national banks had been organized, with an aggregate capital stock of a little over \$42,000,000. Banking capital had not been tempted to this new form of investment. It was necessary to revise the scheme and to enlarge rather than to limit the powers given to the banking associations. For this purpose the act of 1864 was originally introduced in the House of Representatives on March 14, 1864, as House Bill No. 333 ; meeting with much opposition in that form, and having been tabled on April 6, it was reintroduced in a form modified to meet the objections made (none of which touched the subject under discussion) on April 11 as House Bill No. 395. This bill was speedily passed in the House, but received more deliberate consideration in the Senate. The bill having been reported



from the Senate finance committee by Senator Sherman, was explained by him on April 26, 1864, with an indication of the changes made from the act of 1863 and the reasons for them. We quote from his remarks as reported in the Congressional Globe, 38th Congress, First Session, p. 1865 :

“Nearly all the provisions contained in this bill are contained in the act of last year. There are many changes, however, but they are changes of detail, transposition, verbal modifications which are found to be necessary in order to make the law of last year effective and easy of execution. There are, I believe, but six or seven important propositions contained in the new bill that will be likely to excite the attention of the Senate, and I will name them in order to call the attention of Senators to them, so that they may see the difference between this measure and the measure that was passed a year ago.”

He then specifies the following subjects :

1. Under the old law banks redeem their bills at their own counter only ; under this bill at one of some other places named by the Comptroller of the Currency.

2. The authority of the states to tax property of national banks, before obscure, is by this bill clearly limited and defined.

3. The bill provides for converting state banks into national banks.

4. A change had been made in the rate of interest which such banks might charge ; but this change had not met the approval of the Senate finance committee, and they had recommended a restoration of the former provisions on that subject.

5. New provisions as to bonds as a basis for circulation.

6. New provisions as to the denomination of circulating notes.

He then says: "These, I believe, are all the important modifications of the system." Neither in the House nor in the Senate was there any debate at all upon the change in form in this section; and the conclusion is, we submit, irresistible that it was looked upon as a mere matter of detail and revision without purposed change of meaning.

Under each act it was intended to grant the power to do certain specific branches of the banking business, and such other things as were incidental thereto; in the earlier act the incidental clause was written at the end, and in the latter in the beginning. Where it should go is a matter merely of taste in composition. For ourselves, we submit that Judge Sage was correct when he said, in deciding this case in the Circuit Court, that the present form, "though clear, is not put in a strictly logical order. Without changing its meaning it might be paraphrased so as to read," as expressed in the act of 1863 (Rec. p. 314). To the same effect is the opinion of the Supreme Court of Ohio in *Shinkle v. First National Bank*, 22 Ohio St. 516, 524, where they said, referring to this provision as it is found in the act of 1864 (*italics theirs*):

"The words, 'by discounting promissory notes, drafts, bills of exchange,' etc., contained in that section, are not to be read as limiting the modes of exercising the *incidental powers* granted, but as limiting and defining the *kind of banking* which is authorized by the act. In other words, the association is authorized by section 8 to carry on '*banking* by discounting and negotiating promissory notes, drafts, bills of exchange,' etc., and to exercise '*all such incidental powers as shall be necessary*' for that purpose."

So if this were all that were to be found in the National Banking Act upon this subject, we should claim with confidence that the right to borrow existed as inci-

dental to the powers expressly given, and should need only to refer to the prior history of the act and of the banking business as to how and by what officers or agencies those express powers had usually been exercised, to maintain our proposition.

But this is not all. The third clause of Rev. Stat., section 5136, gives national banks power "to make contracts"; and Rev. Stat., section 5202, recognizes the borrowing of money as among the contracts which can thus be made, for that section says :

"No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following :

*First.* Notes of circulation.

*Second.* Moneys deposited with or collected by the association.

*Third.* Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

*Fourth.* Liabilities to the stockholders of the association for dividends and reserve profits."

It will be observed that this clause is modeled upon and copied almost *verbatim* from those found in the Ohio acts referred to on page 37, *supra* ; also that the excepted liabilities which may be without limit include all those which could be made by a direct exercise of the powers specifically granted by clause 7 of sec. 5136. Hence it follows necessarily that this section, as did sec. 26 of the act creating the Bank of England, *supra*, p. 29, and par. 9 of sec. 7 of the act creating the first Bank of the United States, *supra*, p. 31, and other statutory provisions already mentioned, recognizes the existence of the power to borrow,

and that by means other than those specifically defined in sec. 5136, by putting a limit upon it. And as the limitation is that "no association shall at any time be *indebted*, or in any way liable," it covers not merely indirect liabilities by contracts of indorsement or guaranty, such as were sustained in *People's Bank v. National Bank*, 101 U. S. 181, but the direct creation of an indebtedness—in short, borrowing money.

And so these provisions have heretofore been construed. In *Eastern Townships Bank v. Vermont National Bank*, 22 Fed. 186, where a national bank had agreed to pay interest at six per cent as a consideration for a deposit of \$50,000, and this indebtedness had been disallowed by its receiver as being without the scope of its corporate powers, Wheeler, J., said, p. 188:

"It bore interest like a loan. If it was a loan, then the question is as to the power to borrow money. Among the powers of such banks specially named is that to make contracts. Section 5136, subd. 3. There is no apparent limit to this power, except that contained in section 5202. That section provides that no association shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock actually paid in and undiminished, except for circulation, deposits, and drafts drawn against existing funds, and to its stockholders. This implies that it may become indebted within the limit, even if the power to make contracts generally should be held to apply to something else. Powers impliedly given are as well conferred as those expressly given. *National Bank v. Graham*, 100 U. S. 699."

This construction was approved by the Circuit Court of Appeals for the Ninth Circuit, McKenna and Gilbert, Circuit Judges, and Hawley, District Judge, in *Weber v. Spokane National Bank*, 29 U. S. App. 97; 64 Fed. 208,

where it was also held,—following the analogy of *National Bank v. Matthews*, 98 U. S. 621, upon sec. 5136, of *Gold Mining Co. v. National Bank*, 96 U. S. 640, upon sec. 5200, and of *National Bank of Xenia v. Stewart*, 107 U. S. 676, upon sec. 5201,—that breach of the limitation did not affect the validity of the loan, but merely furnished cause for forfeiture of the charter, thus inserting by intendment the express provisions found in the acts relating to the Bank of England, the Banks of the United States, and in the Massachusetts Statutes above referred to.

In *First National Bank v. Exchange National Bank*, 92 U. S. 122–127, this Court, after quoting Rev. Stat., sec. 5136, par. 7, said :

“Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. . . . Banks may do, in this behalf, whatever natural persons could do under like circumstances.”

This we submit, fully sustains our contention, and concedes that national banks may borrow money as fully and as freely as other banks of issue, deposit, discount and exchange.

In *Western National Bank v. Armstrong*, 152 U. S. 346, the Court referred to and quoted part of this passage, and expressed no intent to limit its doctrine. Indeed the power

of a national bank to borrow money under certain circumstances was expressly conceded. But the Court assumed that the exercise of this power was an extraordinary and not an ordinary incident in the banking business. No examination of the subject is made in the opinion, and the language used seems to have been taken almost *verbatim* from the opinion of Judge Blodgett in *Adams v. Cook County National Bank*, as quoted in *Ball on National Banks*, 54 (*supra* p. 69). Our effort has been to bring to the attention of the Court other sources of information, and to show that the assumption of Judge Blodgett, followed without discussion in the *Western National Bank* case, is contradicted by the whole history of banking, in conflict with the actual practice of banks at the present day, opposed to the weight, and otherwise uniform tenor, of judicial opinion, and overlooks the implied grant of power necessarily following from Rev. Stat., sec. 5202. If we have not succeeded in this effort, then our labors on this branch of the case, though not light, have been in vain. But if we are right, then the statement we so earnestly but respectfully controvert is based upon an error of fact and is not conclusive upon this Court in any other cause, and should not be allowed to prejudice the rights of other persons. We submit that banks having the powers given expressly by Rev. Stat., sec. 5136, and inferentially by sec. 5202, are authorized to borrow money, in large sums or in small, with interest or without, on time or on demand, by deposit, by note, by bill, by bond, or by any other form of contract; and that such transactions are not presumptively out of the course of ordinary and legitimate banking. Whether any particular transaction is without that course is to be determined by the circumstances attending it. No inflexible rule can be laid down which will be applicable to all circumstances and all conditions. But the power

being general, and its use regular, it is to be presumed, *prima facie*, in any particular case that it was properly used, and the burden is on him denying to show the contrary.

### III. HOW BORROWING POWER EXERCISED.

As a national bank is an ideal being only, it can act only through others. If it borrows, it must borrow through agents; agents must effect the loan, though in the name of the bank. What agents? The statute says that the bank shall exercise all its powers, principal and incidental, "by its board of directors, or duly authorized officers or agents;" (Rev. Stat., sec. 5136, par. 7). Waiving the question, because not necessary for our case, whether this is a direct grant of power to the officers,—as to which see *Briggs v. Spaulding*, 141 U. S. 132, 144-146,—we shall assume that the board of directors is the sole source of authority.

But as that board is a collective body, manifestly it also can not act directly in effecting a loan. It may resolve; but what it resolves must be communicated by others. It also must act through authority delegated to others. And it may delegate not merely ministerial authority but discretionary power as well. Instances are furnished by the cases of *Fleckner v. Bank of the United States*, 8 Wheaton, 338; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Ridgway v. Farmers' Bank of Bucks Co.*, 12 S. & R. 256; and *Burrill v. Nahant Bank*, 2 Met. (Mass.) 162. Others have been given in the cases already referred to in discussing the nature of the borrowing power; and still others will be found in the cases yet to be mentioned.

How should this delegation be shown? We believe the following analysis shows all the ways in which a board of directors can delegate its powers; and that by these

methods or one of them it can delegate any or all of its powers in the transaction of business.

(1.) By special warrant or resolution for the particular occasion.

(2.) By general warrant expressly given by by-law or resolution.

(3.) By general warrant impliedly given as shown by

(a.) Custom judicially known.

(b.) Custom proved as a fact.

(c.) Abdication by the directors.

We do not pretend that in the case at bar there was any warrant by express resolution either special or general authorizing this loan.

But we do contend that there was an implied warrant shown by each of the methods above mentioned; and that for transactions like that here in question an implied warrant is just as effectual as an express one. For, as this court unanimously said in *Mining Co. v. Anglo Californian Bank*, 104 U. S. 192, 194, speaking of the delegation by a board of directors of authority to negotiate loans (*italics ours*) :

"*It is settled law* that the existence of such authority in subordinate officers may be shown otherwise than by the official record of the proceedings of the board."

*Custom.*—Custom is the root and source of all unwritten law. In its early stages it must be proved like any other fact. But if general in its nature, after being several times proved it becomes so well known that courts take judicial notice of it. An interesting illustration of this process is furnished by the oleomargarine cases recently decided by this court; *Schollenberger v. Pennsylvania*, 171 U. S. 1.

Custom has clothed certain agents with certain powers.



And whoever employs such an agent is presumed to give him all the powers usually attached to his agency; if he would not do so, he must bring home to him who deals with the agent, notice of the restriction he would impose; otherwise the presumption becomes conclusive. Story on Agency, secs. 57-60, 73.

All business contracts are presumed to be made, all agencies are presumed to be granted, with reference to the usages of trade affecting that business or agency. And those usages are determined and found to exist not merely from what the Court may know judicially, but from evidence adduced to prove them.

So in *Ekins v. Macklish*, Ambler, 184, Lord Hardwicke received evidence to show a usage of trade whereby a factor to collect rent under a charter party for a ship had authority also to sell bills of exchange received in payment of such rent.

In *Noble v. Kennoway*, 1 Douglas, 510, Lord Mansfield and his associates upon the King's Bench in an action upon a marine policy insuring ships until they had arrived at their port of discharge and been moored there twenty-four hours, and their cargo until discharged and safely landed, received evidence to show a usage of trade to delay discharging cargo for the purpose of fishing.

In *Adams v. Pittsburg Insurance Co.*, 95 Pa. St. 348, the Court held evidence should be received to show a usage authorizing the captain of a vessel to give notes at its home port for insurance premiums.

And in *Crain v. National Bank*, 114 Ill. 516, where a private bank was sued upon a note given by its cashier in its name for money which he embezzled, the Court held evidence should be received to show it was customary for banks in that place to borrow money on time, as tending to

show such borrowing was within the scope of the duties of the cashier.

The directors of a commercial corporation are presumed to know the acts usually performed by each of the officers of such a corporation. And if by the custom of the trade an incumbent of an office is commonly considered as authorized to buy or sell goods, to give or discount notes, to borrow money, or to do any other act upon behalf of his corporation, then by appointing a person to that office they clothe him with apparent authority to do each of those acts which holders of like offices are accustomed to do.

The directors of a bank are conclusively presumed to know not merely the rules affecting the banking business which have been crystallized into law, but the usages of that business in the places where the bank transacts it, not only in the home city, but in those of its ordinary correspondents. And whatever powers the board may expressly by resolution confer upon the officers of the bank, it is presumed to confer as well not only the powers which the law has declared to be inherent in those offices, but those which the usages of banking in those places have affixed to them. And these presumptions are conclusive in favor of any one dealing with the bank to whom notice of a limitation placed by the directors upon the powers of officers is not brought home.

Therefore, in *Minor v. Mechanics' Bank*, 1 Peters, 46, 70, this Court, speaking through Mr. Justice Story, held that it would be error to refuse an instruction that the assent of the directors might be assumed to actions of the cashier according to the usage of banking, and which the directors could have authorized, though there was no proof that the specific actions were actually known to them, saying :

“The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors; to whom, the charter and by-laws, submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons possessing no other knowledge. In the case of the *Bank of the United States v. Dandridge*, 12 Wheat. 64, the subject was under the consideration of this Court; and circumstances far less cogent than the present to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this Court, that it ought to have been given.”

And in *Insurance Co. v. McCain*, 96 U. S. 84, 86, this Court, speaking through Mr. Justice Field, said :

"The law is . . . plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be co-extensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given."

And in *Case v. Bank*, 100 U. S. 446, 454, this Court, speaking through Mr. Justice Clifford, said :

"Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions ; and their acts, within the scope of such usage, practice, and course of business, will, in general, bind the bank in favor of third persons 'possessing no other knowledge.' *Miner v. Mechanics' Bank of Alexandria*, 1 Pet. 46.

"Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice, and course of business ; and it would be the height of injustice to hold that the bank, as the principal to the cashier, may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story, *Agency* (6th ed.), sec. 127.

"Such an officer is *virtute officii* intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice, and course of business."

These principles are so familiar it surely is not necessary for us to add further citations to those made by the Court below (Rec., pp. 345, 346).

In the case at bar the negotiation for the loan was by correspondence conducted on the part of the borrowing bank by its vice-president. The evidence shows that the vice-president was the active controlling officer of the bank ; in fact, though not in name, its president. With the original application for the loan was transmitted a certificate of deposit, signed by the cashier. Either this certificate was regularly issued for a deposit actually made, or it was not, but simply for the purpose of evidencing this loan. If it was regularly issued for an actual deposit, the Chemical Bank is entitled to recover upon that certificate, and the discussion must stop there. If it was not so issued, then the cashier as well as the vice-president, was acting for the borrowing bank in requesting the loan. Therefore, we have, at worst, the case of the acting president and the cashier of a bank requesting that bank's correspondent and reserve agent to make it a loan. And the question is whether authority to present such a request and to affect such a loan falls within the scope of the duties of those officers, or either of them, as established by the usage of banking, either as judicially known or as proved to exist in the cities where the two banks did business.

The cashier is the ostensible executive officer of the bank. Through him the bank confers with the outside world. Through him the board of directors make known to its customers its demands and requirements, its special usages and practices. They are its brain ; he its mouth as well as its hand.

The president, or officer acting as president, is superior in dignity to the cashier, and may well do those things which the cashier commonly does, and further give the countenance of his responsibility to acts within the scope of the apparent authority of the cashier.

Any act which has the approval of these two officers

has the approval of each ; and if it be something which is incidental to banking as a business, and not an extraordinary act necessarily outside of the conduct of a bank, when approved by either of these officers, is to be taken as approved and authorized likewise by the board of directors.

We have already stated, possibly at too great length, the evidence of which the Court will take judicial notice, that banking is necessarily borrowing ; that every form of borrowing is incidental to the business ; that this has been recognized by legislatures ever since banks were incorporated ; and that works on banking recognize the ability to make use of the various forms of borrowing as one of the ordinary resources of a bank.

It follows from this that requesting or negotiating a loan comes as much within the scope of the duties of the cashier of a bank or his superior officer as requesting a deposit. Ordinarily it is no more than agreeing to pay interest upon a deposit. And this was true in the case at bar ; for under Rev. Stats., secs. 5191, 5195, a general credit to a Cincinnati bank by its reserve agent in New York is as much a part of the deposits of the Cincinnati bank as moneys actually paid over its own counter.

The size of the loan can not of itself determine the power of the officer to effect it. Magnitude, in its relations to business, is always a question of proportion ; and the mere statement of figures can not of itself characterize a transaction as extraordinary and beyond the power of an officer ordinarily authorized to effect such transactions, unless the sum runs to an amount which no human experience can conceive as permissible. Within that limit evidence is required to show that the transaction is extraordinary. If this be shown, then, by that fact, notice is charged upon the lender to inquire as to what authority has been

given the cashier to do an extraordinary thing. But in the absence of evidence of that character the cashier is as much authorized to borrow a sum that seems large as one that seems small.

Magnitude being a question of proportion, the scale varies according to the circumstances. What would be a perfectly legitimate request for accommodation from a partner in a firm having a capital of \$100,000 would be extraordinary coming from one in a firm having a capital of \$10,000, and in the latter case might well put the lender to inquire as to authority. And so what would be a startling proposition coming from a small country bank would excite no comment when made by a bank of a large city. New York and London measure transactions by one scale; Cincinnati and St. Louis by another; Paducah and Kalamazoo by still another. So the number of digits necessary to express the sum loaned do not of themselves show whether that loan is large or small; that can be determined only by the apparent business demands of the person asking the loan.

Therefore the fact that the loan here was for \$300,000 does not of itself show that the loan was large. The borrowing bank was not a small rural concern, but one in a city important enough to furnish reserve banks for other cities under Rev. Stat., section 5191, and advertising its capital as \$1,000,000, and its loans and discounts at over \$4,000,000 (Rec., p. 286). The request was made of its reserve agent; and the reason stated for the request was the desire to keep a large reserve (Rec., pp. 21-22). There is absolutely no evidence even tending to show that any person accustomed to the banking business would at that time have regarded this request as one for an extraordinary amount and suspicious in itself. And in the absence of

such evidence we submit that this Court has no power to draw any such inference.

The custom of banking, whereby cashiers have implied authority to borrow money for their banks, has been judicially recognized without proof in the courts of last resort in New York, Ohio, Pennsylvania, Missouri and Wisconsin :

*Barnes v. Ontario Bank*, 19 N. Y. 152.

*Sturges v. The Bank of Circleville*, 11 Ohio St. 153, 167.

*First Nat. Bank of Allentown v. Sullivan*, 11 W. N. C. 362.

*Donald v. The Lewis County Savings Bank*, 80 Mo. 165.

*Rockwell v. Elkhorn Bank*, 13 Wis. 653.

*Ballston Spa Bank v. The Marine Bank*, 16 Wis. 120, 134.

We do not stop now to quote from these cases, although we shall quote from some of them hereafter. They show conclusively how wide spread and of what long standing has been this custom, and that in 1887, when the transaction took place in the case at bar, no one conversant with the banking business would have dreamed of requiring a known bank officer to produce credentials to show his authority to borrow money upon behalf of his bank.

Not only is the existence of the power to borrow, as inherent in the office of the cashier and his superior officers, established by the course of reasoning just urged, and by the decisions just cited in which it has been directly recognized ; it is affirmed also by decisions as to cognate acts. For where the authority of an agent is to be inferred from the powers usually exercised by such an agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject-matter. *Merchants' Bank v. State Bank*, 10 Wall. 604.

It will be remembered that the borrowing is not always done, as in this case, by a simple request and credit, or the



actual transfer of funds. The loan may be evidenced by a promissory note originally discounted by the lending bank, or by the latter bank rediscounting paper which has already been discounted by the borrowing bank. This appears in the testimony of the witnesses referred to *supra*, p. 71. As stated earlier in this argument, rediscounting is simply a form of borrowing; the bank obtaining the rediscount necessarily indorses the paper rediscounted, and thus pledges its own credit therefor. It stands with reference to the lending bank just in the same position that the original discounter stood with reference to it; and as the original discount was a loan by it, so the rediscount is a loan to it. So, all the authorities which sustain the power of executive officers of a bank *virtute officii* to rediscount paper, sustain also the power of those officers to borrow in any other manner that is usual in the banking business.

That it falls within the apparent scope of the duties of the cashier or other executive officers of a bank to raise money for its use by rediscounting, by selling paper with guaranty of payment, and in other ways, has often been judicially declared.

The germ of the idea lies in what was said by Mr. Justice Story, in 1825, in *Wild v. Bank of Passamaquoddy*, 3 Mason, 505, 506, viz. :

“The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for this purpose is necessary to be proved. If any bank chooses to depart from this general course of business, it is certainly at liberty so to do; but in such case, it is in-

cumbent on the bank to show that it has imposed such restriction, and that such restriction is known to those with whom it is in the habit of doing business. In the present case, the cashier has, as cashier, indorsed the bill in behalf of the bank, and this is *prima facie* evidence of authority, it being within the ordinary duties performed by such an officer. If he was restricted in his authority, it is for the defendants to show it. The proof is in their possession, and the plaintiff, who is a stranger to their regulations, can not be presumed to be conusant of it."

See also the cases cited under proposition IV, *infra*, and *West St. Louis Savings Bank v. Shawnee Bank*, 95 U. S. 555.

*People's Bank v. National Bank*, 101 U. S. 181.

*Sturges & Co. v. Bank of Circleville*, 11 Ohio St. 153.

*Bank of the State v. Wheeler*, 21 Ind. 90.

*Houghton v. First National Bank of Elkhorn*, 26 Wis. 663.

*Bissel v. First National Bank of Franklin*, 69 Pa. St. 415.

*First Nat. Bank v. Sullivan* (Sup. Ct. Pa.), 11 W. N. C. 362.

*Crain v. National Bank*, 114 Ill. 516.

*City Bank of New Haven v. Perkins*, 29 N. Y. 554, 569.

*Merrill v. Hurley*, 6 So. Dak. 592.

*City National Bank v. Hastings*, 46 Neb. 86.

In the case of *West St Louis Savings Bank v. Shawnee Bank*, 95 U. S. 557, this Court, in speaking of the powers of the cashier, say, through Mr. Chief-Justice Waite, on page 559:

"Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of bank-

ing. Thus, he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has secured a *bona fide* rediscount of the paper of the bank, his acts will be binding because he has implied power to transact such business."

In *People's Bank v. National Bank*, 101 U. S. 181, where the vice-president of the defendant bank had by guaranty of payment, without authority from its board of directors, induced the plaintiff bank to purchase certain negotiable notes made by a debtor of the defendant bank to his own order and indorsed in blank, the proceeds being turned over to the defendant bank, this Court, speaking by Mr. Justice Swayne, after quoting from Revised Statutes, section 5136, as to the powers of a national bank to discount and negotiate negotiable paper, say (p. 183) :

"To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

*Sturges & Co. v. The Bank of Circleville*, 11 Ohio St. 153, already referred to, page 66, *supra*, was very similar in its facts to the case last mentioned—the cashier of the defendant bank having sold to the plaintiffs a negotiable note with warranty that it was good, and the action being upon the warranty. The authority of the cashier to make the warranty being denied, the Court, speaking through Sutliff, J., said (p. 167) :

"It is not claimed that the respective duties of the board of directors, president and cashier, in the exercise of the franchises of the bank, are prescribed by the charter. So far, therefore, as the limitation of the appropriate duties of the cashier depend upon his office, we can only have respect to the ordinary and well-understood duties of that officer in determining his powers. A cashier is defined to be one who has charge of money, or who superintends the books, payments and receipts of a bank or moneyed institution. His actual power and duties, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. But in this case, there being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, as well as to that of borrowing money, as the agent of the bank."

Thus far we have considered only evidence of which the Court must take judicial notice, that the usage of banking clothes both presidents and cashiers with authority to borrow money for their banks.

But the case does not stop here. Directors of banks are presumed to know not only those usages which are so well known that the courts notice them without proof, but those special and peculiar usages as to banking which prevail in the places where their bank does its ordinary business. They are presumed not only to know them but to adopt them, and to conduct their business according to them, except in so far, and as to those persons, to whom they have given notice to the contrary. This presumption, which is obligatory on persons who deal with the bank (*Bank of Washington v. Triplett*, 1 Peters, 25, 32-34; *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155), is equally obligatory upon the bank and all its officers. *Neiffer v. Bank of*

*Knoxville*, 1 Head, 162; *Crain v. National Bank*, 114 Ill. 516; *Merchants' Bank v. State Bank*, 10 Wall. 604, 641, 644.

The evidence is undisputed and conclusive that by the usage of banking, as practiced both in Cincinnati and New York, where a bank desired to borrow money the loan was always negotiated by one of its executive officers, without ever showing, or being called upon to show, proof of his authority so to do.

Every bank acted upon the assumption that such an act was within the scope of the officer's official duty, and needed no fortification by the production of either a special or general resolution or by-law passed by the board of directors.

We need not give again the names and qualifications of the witnesses as we have mentioned those *supra*, p. 71; but we desire to quote part of the testimony of some of them on this point.

Dumont Clarke, president of the American Exchange National Bank of New York, after saying that borrowing money was a very common occurrence in the banking business, prior to the decision of the *Western National Bank* case, said (Rec., p. 135):

"Q. 9. Who acted for the borrowing bank in such a case? A. At times the cashier, and at times the president, either one of the officers.

"Q. 10. Did the lending bank, prior to that decision, ever require proof of the authority of the officers of the borrowing bank in the shape of a resolution by the directors authorizing the loan? A. No, sir; we never required any thing like that."

A. B. Hepburn, president of the Third National Bank of New York, having first testified to the existence of that usage, said (Rec., p. 137):

"Q. 10. Who acted for the borrowing bank in such transactions? A. Either of the executive officers; cashier or president.

"Q. 11. How about the vice-president? A. Or vice-president or assistant cashier. Any of the executive officers.

"Q. 12. What proof, if any, did the lending bank require as to the authority of the officers of the borrowing bank to make application for the loan? A. Genuineness of the signature to the application, as well as the correspondence, and they protected themselves by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business.

"Q. 13. Prior to that decision, did the lending bank ever require the passage of resolutions by the board of directors of the borrowing bank directing the making of the loan and authorizing it? A. I never knew of such an instance. It was not a usual thing at all.

"Q. 14. Was or was not the borrowing of money one of the matters that fell within the ordinary scope of the duties of the cashier and vice-president of the bank? A. It was."

Edward Townsend, cashier of the Importers' and Traders' National Bank of New York, having first testified to the existence of the same usage, said (Rec., p. 149):

"Q. 5. Who acted for the borrowing bank whenever it desired to borrow money? A. Any official whose signature was authorized with us.

"Q. 6. And what officials was it customary to give authorization to for signature? A. Generally the president and cashier, and frequently the vice-president and assistant cashier, also.

"Q. 7. Did the lending bank prior to that decision ever require proof of authorization to make the loan in

the form of a resolution of the board of directors of the borrowing bank? A. Never to my knowledge."

George F. Baker, president of the First National Bank of New York, having testified to the same usage, said (Rec., p. 150):

"Q. 5. Who acted for the borrowing bank when a loan was to be made? A. Any of its officers.

"Q. 6. When you say any of its officers, whom do you class as officers? A. Generally the president or cashier, and occasionally a director.

"Q. 7. How about the vice-president? A. The vice-president; yes, sir.

"Q. 8. In such cases did the lending bank require the proof of authority of the officer of the borrowing bank making application for the loan in the form of a resolution of the board of directors authorizing the making of the loan? A. No, sir."

Frederick D. Tappan, president of the Gallatin National Bank of New York, having testified to the same usage said (Rec., p. 152):

"Q. 8. In the making of such loan who acted for the borrowing bank? A. Either the cashier or president.

"Q. 9. How about the vice-president? A. The vice-president, in the absence of the president. In some cases the vice-president is the more active man; not usually, but there have been cases where the vice-president has been the more active man of the two.

"Q. 10. And in such cases he would be the person naturally to act? A. Yes, sir.

"Q. 11. In making such loans did the loaning bank require proof of the authority of the officer of the borrowing bank making the application, by a resolution of the board of directors, prior to this decision of which I have spoken? A. I think not.

"Q. 12. When you say you think not, how positive is your information upon this point? A. That they never

have required a resolution of the board of directors of the borrowing bank."

W. S. Rowe, cashier of the First National Bank of Cincinnati, said (Rec., p. 186) :

"Q. 9. Mr. Rowe, tell us whether or not, prior to the decision of the Supreme Court of the United States, in the case of *The Western National Bank v. Armstrong, receiver of the Fidelity National Bank*, in the spring of 1894, about a year ago, it was considered within the scope of the duties of the cashier of a bank to borrow money for his bank?  
A. Yes, it was.

"Q. 10. What, if any thing, was required by the lending bank, beyond the application of the cashier or one of his superior officers—the president or the vice-president of the bank? A. Our rediscounting for country banks, for the loaning of the money, was usually done by correspondence, and the letter would be signed by either the president, vice-president or cashier. If it was a rediscount we took their acceptable business paper, with their indorsement; if it was a direct loan we took the note of the bank, signed by one of the three officers I have named, with municipal bonds, or other good bonds as collateral, without any thing else.

"Q. 11. Was any resolution of the board of directors required? A. No, sir.

"Q. 12. Do you know whether that was usual in banking—in the banking business, prior to 1894? A. It was not, so far as my knowledge goes."

G. P. Griffith, vice-president of the Citizens National Bank of Cincinnati, having testified that borrowing money was a usual thing, said (Rec. p. 196):

"Q. 9. Mr. Griffith, please state whether or not, prior to that decision, it was a usual thing for the lending bank to require from the borrowing bank a resolution of the board of directors authorizing the loan. A. Never.



"Q. 10. State whether or not the borrowing of money for a bank, from another bank, was one of the duties incident to the office of cashier, president or vice-president, or either of them? A. Well, I don't think you put your question right—

"Q. 11. Well, just answer the question according to your knowledge of the facts, please? A. It is customary to make loans to correspondent banks when applied for either by the president, vice-president or cashier of said bank.

"Q. 12. Was proof ever demanded as to the authority of either of the officers you have named to make the loan? A. Not to my knowledge or memory."

J. D. Hearne, President of the Third National Bank of Cincinnati, having testified to the same practice, said (Rec., p. 200):

"Q. 4. State whether, prior to that decision, it was customary for the lending bank to require from the borrowing bank the passage of a resolution by its board of directors, authorizing the loan? A. It was not.

"Q. 5. Was the passage of such a resolution ever required by the lending bank, so far as your knowledge goes? A. It never was, so far as my knowledge and experience goes.

"Q. 6. Mr. Hearne, what officers acted for the borrowing bank in such transactions? A. The managing officers; either the president, or the cashier, as the case might be.

"Q. 7. How about the vice-president? A. The vice-president would act if he were an active officer.

"Q. 8. What proof, if any, did the lending bank require of the authority of either, or any, of these officers to make the loan, more than the knowledge of the fact that they held their respective positions? A. Did not require any.

"Q. 9. Mr. Hearne, did it, or not, fall within the scope of the duties of the cashier, president, or vice-presi-

dent to borrow money on behalf of his bank from another bank? A. It did. It was so regarded."

Evidence to like effect was given by George G. Williams and William J. Quinlan, the president and cashier of the Chemical National Bank (Rec., p. 130, Q. 9, XQQ. 1-5: Rec., pp. 123, 124, QQ. 17-21, XQQ. 3-7), and also by M. M. White and H. C. Yergason, presidents of the Fourth and Merchants' National Bank of Cincinnati (Rec., pp. 166-168, QQ. 7-17, and p. 193, QQ. 5-10).

*Abdication.* As we have said in the statement of the case, the directors of the Fidelity Bank practically intrusted the whole management to Harper. Evidence of the strongest nature to this effect is furnished by the minutes of the board of directors, Rec., pp. 247-259, from which it appears that the only business ever done by the directors was the election of officers and fixing of their salaries, the enactment of by-laws, the declaration of two dividends, the ratification of the action of the officers in purchasing government bonds to be deposited as security for government deposits, and the taking steps in an improper way toward the increase of the capital stock. Absolutely no control or supervision was reserved or exercised over the business of the bank, not even in the matter of discounts. At the last meeting held by the board, Mr. Kineon, who had frequently theretofore endeavored to induce Mr. Swift, the president of the bank, to bring the discounts before the board, offered a resolution looking to the examination of the discounted paper by a committee, Rec., p. 259; and his showing this insubordination resulted in his retirement from the board. The story will be found in his evidence, pages 178-184. He was a director of the bank from the beginning until May 10, 1887, when the events took place

to which we have just referred. In his testimony he says (Rec., p. 178):

“Q. 6. Up to the time when you quit, Mr. Kineon, who was the active officer managing the bank? A. Mr. Harper—E. L. Harper.

“Q. 7. What was his official position? A. He was vice-president.

“Q. 8. What did he do with reference to the bank? A. He did every thing; he ran the whole bank.

“Q. 9. Did the directors know that he was running the whole bank? A. Well, I guess they were aware that he had charge. I don't know why they didn't.”

Mr. Franklin Alter was a director at the organization of the bank and remained such until the annual election in January, 1887. He testified as follows (Rec., p. 172):

“Q. 6. Mr. Alter, state, during that time, who had the practical control and management of the Fidelity National Bank? A. E. L. Harper.

“Q. 7. Was that known to all of the board of directors? A. Yes.

“Q. 8. Was it with their consent and approval that Harper managed the bank? A. Yes.

“Q. 9. Were the directors advised of the transactions of the bank, in the way of loans and discounts, and cash items, and other things of that kind? A. I don't think they ever were, in detail, unless they went outside and got their information from other sources.

“Q. 10. They practically entrusted the whole management of the bank to Harper? A. Yes.

“Q. 11. What was E. L. Harper's position in the Fidelity? A. He was vice-president.

In the history of the bank Mr. Alter showed a tendency to do his duties in more than a perfunctory manner. He wished to investigate the fitness of Harper, Baldwin, and the assistant cashier, Hopkins, for their respective

offices ; he wished also to investigate as to the condition of the bank. He was rebuffed, and naturally ceased his efforts, and was dropped from the board at the first opportunity. The story will be found in his testimony (Rec., pp. 172-176).

The testimony given by these two members of the board of directors is confirmed by that given by C. A. Hinsch, one of the receiving tellers (Rec., pp. 176-178), A. P. Gahr, another member of the board and confidential secretary of Harper (Rec., pp. 202-204), and J. H. Watters, general bookkeeper (Rec., pp. 235, 236, questions 52-63) ; nor is it anywhere contradicted by evidence offered by the appellant. The only witnesses called by him who alluded to this subject were J. H. Matthews and Henry Pogue. Mr. Matthews was a brother-in-law of Harper and a member the board of directors. He was elected upon the first board in 1886, but immediately resigned (Rec., p. 247). He was again elected in January, 1887, taking Mr. Alter's place, and served during the residue of the existence of the bank. He was not examined in chief as to the conduct of the board (Rec., p. 237), but on cross-examination he confirms the testimony of the other witnesses ; for the only instance which he can recall when the management of the bank was discussed in the board was what occurred at the meeting when Mr. Kineon resigned (Rec., p. 239 ; QQ. 16-21, and p. 242, Q. 48), and his testimony shows that Mr. Harper was not merely the dominant spirit, but the actual controller of the bank.

Mr. Pogue was elected a director to succeed Matthews at the formation of the bank, and continued to the end. All that he said on examination in chief upon this question is (Rec., p. 243) :

“ Q. 4. Were you an active director, Mr. Pogue, dur-

ing the whole time? A. Well, yes; I suppose all the directors are supposed to be active; we all took an active interest in the affairs of the bank."

On cross-examination he states that there was a loan committee composed of the active officers of the bank (Rec., p. 244, XQ. 4, referring, we suppose, to by-law 17, Rec., p. 252). Being asked wherein the directors displayed their activity in managing the bank, he said that the directors did not manage it, but the officers did; that the directors met at stated times and had reports from the officers which were spread upon the minutes; that the only instance he can recall in which the directors of their own motion sought for any information was again at that meeting when Kineon's request for information brought about his resignation; that with that one exception the directors left the management of the bank to the board of officers; that Harper was the active managing man on that board and of the bank; and that the directors never looked into the cash account (Rec., pp. 244, 245, XQQ. 5-17). The minutes show that reports like those Mr. Pogue speaks of were not made. The only reports there appearing are one of the business done on the day the bank opened, and another of the resources and liabilities on December 23, 1886 (Rec., pp. 248-249, 254-255).

The subordinates in the bank knew of the entries which Harper caused to be made, transferring funds in the cases of the loans by the Chemical Bank and the First National Bank of New York; for without their assistance those entries could not have been made. They must also have known of the abstraction of the collaterals which went to secure the loans which Harper made in New York in the name of the Fidelity Bank at those times; for it is inconceivable that assets of the bank of so large an amount should

have been abstracted from its vaults without their knowledge. The inquiry suggested by Mr. Kineon, and which the directors declined to pursue until Kineon was retired from the board, would have disclosed that abstraction and the transactions connected with it if faithfully pursued.

The bill of complaint which the receiver filed against the directors shows discounts in many cases far in excess of the limitations imposed by Rev. Stat., section 5200. These transactions must have become known to the directors if they had been willing to give even the most perfunctory attention to the performance of their duties.

The 22d by-law of the bank prohibited in terms the carrying of cash items as cash (Rec., p. 252); yet Harper was permitted to direct this to be done (Rec., p. 177), and the extent to which it was done appears in that bill; and some of the directors were also favored in this way (Rec., p. 212). In the final throes Harper, without authority from the directors sent away over \$1,000,000 of the bills receivable of the bank to secure a further loan from the Chemical Bank. This transaction was never questioned either by the directors or by the receiver. The collections from those securities are shown in Watters Exhibits 8 and 9 which have not been printed in full (Rec., pp. 115, 116). But the New York decree (Rec. p. 26) shows that these collections left, after satisfying the June loan, a balance of \$271,808.34 in the hands of the Chemical Bank; and Armstrong Exhibits Nos. 7 and 8 show that there were still uncollected other securities amounting to many thousands of dollars.

The evidence, therefore, fully warrants the assertion that the board of directors intrusted the bank to Harper, and practically gave him *carte blanche* to manage it as he saw fit. In no way did they attempt to watch over, direct, or control his actions. In 1887 a majority of them were

his nominees, and held their positions at his will, viz: Baldwin, Hopkins, Gahr and Matthews, besides himself. The stock in the name of these four men was really held by Harper (Rec., p. 173, QQ. 18, 19; p. 202, Q. 5; p. 238, QQ. 6 and 7). The stock ledger accounts of Harper, Matthews and Gahr are given on record pages 302-305; and an analysis of these will show that in February, 1887, Harper, in their names and in his own, was the registered owner of over \$390,000 of the capital stock of the bank, its whole capital being only \$1,000,000. Because of his overwhelming personal interest in its affairs, and because of their confidence in his ability and trust in his integrity, the directors of the bank practically abdicated their positions and suffered him to be dictator. They have paid out of their own pockets for this confidence and misplaced trust, as is shown by the bill of complaint filed against them by Armstrong and the decree thereon (Rec., pp. 271-289, 291 and 294). But this is not the only result which follows; for it is well settled that such conduct by a board of directors is a delegation to the dictator thus created by them of every power which he has in fact exercised, and which they might in law delegate.

*Martin v. Webb*, 110 U. S. 7, 14.

*Glidden & Joy Varnish Co. v. Interstate National Bank*,  
32 U. S. Appeals, 664; 69 Fed. 912.

*Davenport v. Stone*, 104 Mich. 521.

*Wing v. Commercial and Savings Bank*, 103 Mich.  
565.

*First National Bank of Kalamazoo v. Stone*, 106 Mich.  
367.

*City Bank of New Haven v. Perkins*, 4 Bosworth, 420.

*Martin v. Webb*, 110 U. S. 7, is pertinent to many aspects of the case at bar. The question involved was

whether a bank was estopped to deny the authority of its cashier to cancel certain notes held by it, and the deed of trust securing them, without payment. The evidence showed that the cashier had been given practical control of the bank, as Harper was in the case at bar. And thereupon the Court held the bank estopped by his act, although that act was one which confessedly did not fall within the scope of his apparent authority. The Court said, speaking through Mr. Justice Harlan, and referring to the powers of the cashier (page 14) :

“Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corpora-



tion, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The judgment in *City Bank v. Perkins*, 4 Bosw. 420, was affirmed in the Court of Appeals, 29 N. Y. 554. But the opinion in the Court below has been frequently cited and its reasoning approved by other Courts, and for that reason and because of the force with which the opinion is stated, although it is that of an inferior tribunal, it is worthy of the serious consideration of this Court. The question involved was as to the liability of a bank for money borrowed in its name by its defaulting cashier, McMillen; and on page 441 the Court said:

"McMillen, as such cashier, had authority to borrow money for the Bank of Akron. To what extent he borrowed for the bank, the evidence does not disclose. He had, practically, the whole management of the business of that bank. Its board of directors met semi-annually, but according to the evidence before us did not, at those meetings, or at other times, inquire as to the details of its business, the mode of its operations, or into the manner in which the cashier was prosecuting its business.

"Under such circumstances, we think the plaintiffs are entitled to have this controversy determined upon the prin-

ciple, that as between them and the Bank of Akron, the cashier of the latter was fully authorized to borrow money for it, and in its name, and that any loan made by the plaintiffs, in good faith, on an application of the cashier of the Akron Bank, as such cashier, to borrow for it, is a loan to that bank, and that such bank is primarily liable for such loan, as the party borrowing."

And again on page 444 it was said :

"There is no pretense that the nature and extent of the authority of the cashier of the Bank of Akron have ever been defined by any direct act of the corporation. On the contrary, he has been permitted, as being within the scope and limits of his authority, to exercise a large range of powers, and his own judgment as to the transactions which he deemed to be for the interest of the bank, and the terms on which he should contract, in making engagements as its agent, which the bank might lawfully make.

"Such exclusive control and management for so long a period by the cashier, with the assent of the directors, amounts to an authority to him to make contracts, in relation to its business which the bank might lawfully make, and will conclude the bank as between it and a party who has dealt directly with it through such cashier, and who, on the faith of his having authority to make such a contract, has loaned money to, or paid it for such bank."

"Not only the case just cited, but all others cited in the same connection, were cases as to the responsibility of banks for actions of their officers without explicit authority from their boards of directors, and they have been selected for this reason. Had we extended the citations so as to cover other classes of corporations, the list might have been extended almost indefinitely.

The case of *Wing v. The Commercial and Savings Bank*, 103 Mich. 565, was as to the authority of Fuller, the cashier of the defendant bank, to release parties liable on commer-

cial paper held by it. The scope of action left open to Fuller resembles greatly that permitted Harper; for the Court say, page 569:

“It is not claimed that any of the other directors or officers of the defendant bank had any actual knowledge of these transactions, or took any part in them. Fuller and his relatives and personal friends, all of them non-residents of Ludington [the place where the bank was located], owned a majority of the stock of the defendant bank; and Fuller, as he often boasted, was the sole manager, and could do any thing he pleased in relation to the management of the bank. He openly asserted this on different occasions, and his course of conduct lent all possible color to the claim. He advanced the money of the bank to build a club house in the city of Ludington. He took stock in manufacturing companies, and did other extraordinary things for the cashier of a bank to do, without any protest on the part of the resident directors of the bank. The directorate was made up of men totally unacquainted with banking, men engrossed in other affairs, and who had neither time nor inclination to look after the affairs of the bank. They voluntarily left all matters to the discretion of Fuller; seldom held meetings of the directors; and it is uncertain, under the evidence, whether a meeting was held between the 1st of April and the 15th of August of the year 1892. . . . It appears from all the testimony that the boast of Fuller that he controlled the bank was not an empty or idle one by any means. It does not appear that the outside stockholders took their stock on the express condition that Fuller should have absolute control, or that there was any express agreement to that effect. It does not appear whether the directors had actually voted to confer unusual powers upon Fuller, but it does appear that he claimed and exercised them without let or hindrance on all occasions. He was by sufferance, if by no other authority, something more than a cashier; he was the manager of the bank.”

The rule of law applicable to actions of an agent acting under the circumstances just detailed is expressed by the Court on page 576, as follows :

“ The rule undoubtedly is that usually the authority of a cashier of a bank is a limited authority, and that a party seeking to show a release by the cashier from liability upon commercial paper held by the bank, except in the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. That authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage, practice, or mode of doing business by the bank. If a cashier be allowed to exercise general authority in respect to the business of the bank for a considerable time,—in other words, if he is held out to the public as having authority in the premises,—the bank is bound by his acts, as in case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if they were expressly granted. The directorate of a bank can not be permitted to neglect its duties, abandon the management to the cashier, permit him openly and notoriously and without rebuke to deal with the public as having authority and then escape responsibility.”

**IV. THE CHEMICAL NATIONAL BANK WAS NOT  
REQUIRED TO SEE THAT POWER TO BOR-  
ROW THIS MONEY HAD BEEN DELEGATED,  
BUT MIGHT PRESUME THE LOAN WAS AU-  
THORIZED.**

This is but a concrete statement of the abstract propositions heretofore discussed ; their application to the facts of this case. Those facts, briefly restated, are that it is a usual thing for one bank to borrow money from another ; that the form of the loan is by rediscount of paper already held by the borrowing bank, or by original discount of a note made by it, or for its accommodation and indorsed by it,

or upon its certificate of deposit to the order of one of its officers, or upon its simple request in writing—collateral security being usually required when the loan was not a rediscount of existing paper. The request for the loan was always made by one of the executive officers of the bank, president or cashier, or, if active officers, vice-president or assistant cashier. No proof of authorization of the loan by the directors, or of general or special delegation of authority to make it, was ever required, appointment to the office being considered as giving credence and the right, as well as the duty, to speak for the bank.

All these features are present in this case. The two banks concerned were correspondents, the lending bank being a New York depository and reserve agent of the borrowing bank—the most natural source to be applied to for a loan; the request came from the vice-president of the Fidelity Bank; it carried with it the usual evidences of its genuineness, viz., a certificate of deposit issued by the Fidelity Bank, in favor of the officer making the request, and bills receivable as collateral; and it was fortified and shown to be made with the approval of the cashier by his signature to this certificate of deposit. Every thing, therefore, was regular upon its face, nor was there any thing to excite suspicion. And it will be remembered that this was done, not by any usage peculiar to these two banks, but in accordance with the usage of all banks. Such is the testimony for the appellee, and, as observed by the Court below (Rec., p. 345):

“The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage, lends most significant support to the view that it was well known and generally acquiesced in.”

To the same purport is the language of Judge Sage in the Circuit Court (Rec., p. 309):

"All this testimony is uncontroverted, and it is quite significant that although Receiver Armstrong was himself an old and experienced banker, it was not until after the decision of *Western National Bank v. Armstrong* that the point was made that the negotiation of the loan upon which this suit is based was outside the ordinary course of business in banking, and not within the authority of the line of the duties of the vice-president of the Fidelity Bank."

It is now contended, however, that the banks of the country did not know how to conduct their business; and that they could not safely make a loan to another bank without having evidence that it was authorized by the directors of that bank. The cashier is the executive officer of a bank, and the person through whom decisions of its board of directors are ordinarily communicated to the outside world. Hitherto they had been trusting to his assurance that the loan was authorized, given it is true by implication, but still necessarily given whenever the request came through him. Of what avail, therefore, to ask any further assurance when the request for the loan comes through the cashier. If he gave a written statement, that might be false. Even if a certified copy of resolutions passed by the directors were demanded, yet this certificate would be made by the cashier, and might again be false—indeed, would be false if the cashier were perpetrating a fraud. Suppose such a false certificate were given, would the bank nevertheless be liable? This might be doubted, for the agency of the cashier is to certify what appears upon the minutes, and not as to what does not there appear. *Pollard v. Vinton*, 105 U. S. 7. And if it be said that nevertheless the scope of his authority is to give certificates, so it may be answered the scope of the authority

of the master of a vessel is to give bills of lading; and that in each case the authority is limited to certifying to the truth, and does not extend to creating a liability by certifying a falsehood. And furthermore, as the cashier is the executive officer of the bank, it falls within the scope of his authority to conduct the business of the bank as authorized by the board of directors just as much as, as secretary of that board, it falls within his duty to give certificates as to their proceedings. Introducing this novelty of requiring a certified copy of a resolution by the board of directors does not serve to protect banks against frauds by their cashiers, for the cashier who would borrow without authority would not hesitate to forge proof of the authority; and the claim of the lending bank based upon such forgery can be sustained only by a process of reasoning which, in its full development, would sustain its claim upon the representation of the cashier without the forgery accompanying it. The only safe course for a lending bank to take, if this rule as to the necessity of an express delegation of authority shall prevail, will be to have a delegate present at the meeting of the board of directors of the borrowing bank, able to testify thereafter as to what then occurred.

What was said in the case of the *Western National Bank v. Armstrong*, 152 U. S. 346, with reference to the necessity of special delegation of authority and proof thereof, was said without the information now laid before the Court as to the nature of the banking business, and the manner in which it is conducted. To apply the rule there laid down to the different state of facts shown by this record, would be not only to overthrow a long line of decisions as to the banking business, but to shake to their foundation principles heretofore considered settled beyond debate in the law of corporations and that of agency. In the leading case in England of *Royal British Bank v. Turquand*, 6 E. &



B. 327 (Exchequer Chamber; reported below in 5 E. & B. 248), the question was raised as to the indebtedness of a corporation upon a loan made by its board of directors, whose authority to borrow depended upon the passage of a resolution at a general meeting of the company. The Exchequer Chamber, through Jervis, C. J., said, p. 332:

“We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.”

It will be remembered that the deed of settlement of an English corporation is equivalent to the charter of an American corporation—an instrument filed in a public office so as to be accessible to the world at large. The information given there by the statute and deed of settlement as to the powers of a corporation and the limitations thereon, is that which is given with reference to a national bank by the statutes of the United States, and the articles of association which are filed with the Comptroller of the Currency. But as these articles are required, and can be expected, to contain only the matters specified in Revised Statutes, section 5134, really the only source of information as to powers and limitations to be examined by one dealing with a national bank is the statute book. The effect of the decision just cited is that where the directors of a bank are exercising powers conferred by statute or charter only upon condition of previous authorization by the body



of stockholders, one dealing with the directors may rightfully assume that the stockholders have given the necessary authorization; he is not required to demand an inspection of the minutes of the stockholders' meetings, or a certified copy of their action. It comes within the apparent scope of authority of the directors to borrow money; if the loan effected by them is beyond the actual limit of their authority, the loss must fall upon those who put them in office and enabled them to deceive the outside world. The rule thus applied to the actions of the directors is equally applicable to the actions of all other officers of the corporation. In short, if borrowing money be within the power of the corporation, and if the officer effecting a loan be the one through whom, in the proper course of business, a loan should be negotiated, then the lender need not seek proof of special authorization. It is only an application of the general principle in the law of agency, that knowledge of limitations upon the powers of a general agent must be forced upon, and not sought by, one who deals with him.

So in the *Colonial Bank of Australia v. William, L. R.*, 5 P. C. 417, it was held (*italics ours*):

“Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitutions of such companies, and for regulating their proceedings; it will be assumed *in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.*”

To the same effect are *Agar v. The Athenæum Life Association Society*, 3 C. B., N. S. 725, and *Prince of Wales Life & Ed. S. Co. v. Harding*, E. B. & E. 183.

The latest English case upon the subject is *Biggerstaff v. Rowatt's Wharf, Limited*, and *Howard v. Same*, [1896]

2 Ch. 93. The decision was by Lords Justice Lindley, Lopes and Kay in the Court of Appeal, and its importance and applicability to the case at bar justify us in stating it somewhat in detail. The defendant company was a corporation conducting a wharf. Its articles authorized the directors to appoint a managing director, and to confer upon him such of the powers of the board as they saw fit, other than the drawing, accepting or indorsing bills of exchange or promissory notes. Mr. Davy had been recognized and was acting as managing director, but there was nothing upon the directors' minute book to show either his appointment or what powers were conferred upon him. At the time of the transactions in question the board consisted of three members. On October 20, 1894, Harvey, Brand & Company discovered that the defendant company had misappropriated sundry barrels of which it was warehouseman. On October 22, 1894, a meeting occurred between Harvey, Brand & Co. and the three directors of the defendant, at which the former threatened criminal proceedings, and demanded the transfer to them of sundry securities held by the company. The meeting was postponed to the next day, when one of the directors was absent; and representation being made that the company had no money to pay wages, and must close the wharf unless they could get an advance, Harvey, Brand & Co., having interests which would suffer if the wharf were closed, agreed to advance the money for wages, upon getting security for the advance and for the moneys due them on the prior transactions. The managing director then gave them the security desired. On October 30, 1894, the defendant company went into the hands of a receiver; and at that time Harvey, Brand & Co. were indebted to it for storage. The cause is reported upon their claim to set off the moneys due them for the advance and the preceding misappropriation against the claim

for storage, and to be paid moneys which had been collected by the receiver on claims hypothecated to them. Upon this subject the members of the Court spoke as follows :

Lindley, L. J. (p. 102) : "It is said that the company is not bound by those orders [the assignments to Harvey, Brand & Co.] because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether, according to the constitution of the company, the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors, except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are in my opinion valid."

Lopes, L. J., p. 103, after discussing some other questions, says :

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was managing director, and acted as such, and, according to the articles the directors could have given him the power which he purported to exercise. There is an absence of evidence that they have done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by di-

rectors to transact business for a company the authority of those persons to bind a company within the scope of their employment can not be denied by the company, unless (1) their employment was altogether beyond the powers of the directors; or unless (2) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point. In *Smith v. Hull Glass Co.*, 8 C. B. 668, 11 C. B. 897, it was held that a company registered under 7 and 8 Vict., c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule J. went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities.'

"Every word of that applies here. It can not be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bona fide*, or that they had not a right to assume that Mr. Davy was duly appointed."

Kay, L. J., said, page 106: "Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing *ultra vires* of a managing director; and it would be extraordinary if a person dealing *bona fide* with the manag-

ing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases shewing that a person so dealing with an officer of a company has a right to presume that all has been done regularly."

The principles underlying the decision just quoted have been repeatedly affirmed by this Court. Upon them rest the long line of decisions as to the effect of recitals in city and county bonds, which are so familiar that it will be necessary only to refer to the subject generally, and specifically to the case of *Moran v. Commissioners of Miami County*, 2 Black, 722, where (page 724) the opinion in *Royal British Bank v. Turquand*, 6 E. & B. 327, was quoted at length and approved. Upon this reasoning rests the decision in *Merchants' Bank v. State Bank*, 10 Wallace, 604, where the Court, speaking through Mr. Justice Swayne, in words which, with reference to the credit which may rightfully be given to the acts and declarations of cashiers and vice-presidents of banks, are fully applicable to the case at bar, said (p. 644) :

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court.

“Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such he approached the Merchants’ Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

“Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.

“Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants’ Bank, and the bank, under the circumstances, had a right to believe him.”

The case of *Barnes v. Ontario Bank*, 19 N. Y. 152, is of acknowledged authority, and was cited with approval in *Merchants’ Bank v. State Bank*, 10 Wallace, 650. There the cashier of the defendant bank, without the authority or knowledge of its board of directors or other officers, had procured the discount of its certificate of deposit issued without any deposit having, in fact, been made. The proceeds of the discount were placed to its credit with its New York correspondent, but no entry of any kind relating to the transaction appeared upon the books of the defendant bank. The Court held the bank liable upon the certificate, and in the principal opinion it was said (p. 156) :

“The first questions presented are, whether the bank had power to borrow the money, and whether the cashier was a proper agent to execute that power without any special delegation of authority thus to act. That the power

to borrow existed, was determined by this Court, upon the fullest examination, in the case of *Curtis v. Leavitt*, 15 N. Y. 9. That the cashier, in virtue of his general employment, could exercise the power, was not denied upon the argument, and the proposition does not admit of a reasonable doubt."

The counsel who argued the case were Francis Kernan for the bank, and Nicholas Hill for the certificate holder—two of the most prominent lawyers of that day in the State of New York. The principle there decided was again affirmed by that Court in *Coats v. Donnell*, 94 N. Y. 168, where it was said (page 176) :

"The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence."

In *Donnell v. The Lewis County Savings Bank*, 80 Mo. 165, the plaintiffs were the same New York banking firm as in the previous case, and were again attempting to sustain a loan which they had made to a Western bank upon an obligation executed in its name by one of its officers without authority expressly delegated by its board of directors, viz., a note signed by the cashier individually, payable to the order of the bank and indorsed by the bank through its president, which the plaintiffs had discounted, knowing it to be what bankers call "made paper," that is, paper without real consideration as between the parties, and made up merely to evidence the loan. The authority of the defendant bank to borrow money, and that of its officers to bind it upon such paper, were challenged and



denied by the Court below. This judgment was reversed, and the Court sustained the authority of any corporation, having general banking powers, to borrow, and also the apparent scope of the authority of the cashier to execute such power, and held that one dealing with him need not prove either special delegation or subsequent ratification. The opinion merely states the propositions with the conclusions reached, and refers for a fuller discussion to the case of *Ringling v. Kohn*, 6 Mo. App. 332, where similar questions were presented, saying (p. 171) :

“These positions are well supported by the numerous authorities cited and relied on by the Court of Appeals in its well-considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that.”

The facts in the latter case were in brief as follows : The cashier of the People's Savings Institution, a corporation having general banking powers, borrowed from Kohn money in its name upon its demand note signed by him as cashier, pledging as security government bonds belonging to Ringling which the bank held on special deposit ; the cashier then absconded, being a defaulter in an amount much larger than the loan. The suit was by Ringling against the pledgee to recover his bonds. On the first trial Ringling recovered judgment, which was reversed upon grounds not material to the present discussion, 4 Mo. App. 59. On the second trial Ringling again recovered judgment, the Court below holding that the act of the cashier in borrowing the money did not bind the bank without proof of special delegation or subsequent ratification. In reviewing this judgment the Court of Appeals, after affirming the power of the bank to borrow money as being “a necessary and inherent privilege, inseparable from the exercise of its banking



functions," and referring with approval to the decisions in *City Bank v. Perkins*, 4 Bosworth, 420, and *Barnes v. Ontario Bank*, 19 N. Y. 56, cited above, sustains the conclusions there reached, and sums up the matter in the following words :

"We find no judicial authority for the proposition that when a cashier borrows for his bank, the lender will be imperiled unless a special power has been given."

The opinion of the Supreme Court of Pennsylvania in the case of *First National Bank v. Sullivan*, 11 Weekly Notes of Cases, 362, is so terse and so much to the point that we quote it in full :

"We have no doubt of the power of national banks to borrow money by means of negotiable paper, made or indorsed for their accommodation, and that they are bound by the contract of their presidents or cashiers to indemnify the person who may have accommodated them with his credit. It is a usual banking operation, and unless expressly prohibited, would be necessarily implied in every bank charter."

In *Farmers' National Bank v. Sutton Manufacturing Co.*, 6 U. S. App. 312, the Court (Mr. Justice Brown and Circuit Judge Taft), in speaking of the question whether the Manufacturing Co. could avoid its acceptance in the hands of a *bona fide* purchaser for value before maturity on the ground that it was *ultra vires*, said (pp. 332-3) :

"If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped from denying against any person who in dealing with the corporation has parted with value on the faith of

it. The principle has been frequently applied in cases of commercial paper issued in the name of a corporation by its officers having general authority to issue such paper. A leading case is that of *Stoney v. American Life Insurance Company*, 11 Paige, 635. Chancellor Walworth there decided that a negotiable security of a corporation, which upon its face appeared to have been duly issued by the corporation and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose and at a place not authorized by the charter of the Company, and in violation of the laws of the state where it was actually issued.—See, also, to the same effect, *Farmers' & Mechanics' Bank of Kent County, Maryland, v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Bissell v. Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258, 289; *The Mechanics' Banking Association v. New York & Saugerties White Lead Company*, 35 N. Y. 505; *National Bank of Republic v. Young*, 41 N. J. Eq. 531; *Wright v. The Pipe Line Co.*, 101 Pa. St. 204; *The Hackensack Water Company, Reorganized, v. DeKay*, 36 N. J. Eq. 548; *The Credit Company, Limited, v. The Howe Machine Co.*, 54 Conn. 357; *Gelpcke v. The City of Dubuque*, 1 Wall. 175–203; *The Genesee County Savings Bank v. Michigan Barge Co.*, 52 Mich. 438; *Bird v. Daggett*, 97 Mass. 494."

In connection with the last of these cases see *Monument Bank v. Globe Works*, 101 Mass. 57.

Pertinent observations with reference to the matter under discussion are found also in the opinion of the Court of Errors and Appeals of New Jersey in *The Hackensack Water Company, Reorganized, v. DeKay*, 36 N. J. Eq. 548, one of the cases mentioned in the list just quoted. Speaking with reference to the obligations of a corporation, the Court say (p. 563, *italics* ours) :

"Persons taking securities of this character are chargeable with the knowledge of the power to make them as con-

ferred by the Charter. If the power granted by the Charter is subject to a condition relating either to the *form* in which the security shall be made in order to be valid, or to some preliminary proceeding, *extraneous to the acts* of the corporation or its officers, securities issued not in the prescribed form, or without the preliminary proceedings had, are subject to defenses in consequence thereof, even in the hands of *bona fide* holders."

The Court illustrates this by the case of a statute requiring as a preliminary to the issuing of bonds by a county, town or other corporation, that the assent of a certain proportion of voters or tax payers shall first be obtained; and then observes:

"But this doctrine does not prevail in those instances in which the right to issue such securities is by the Charter *conditioned upon the performance of acts by the corporation or officers relating to the management of the affairs of the company.*"

The Court then proceeds to cite the various English and American cases, and states they all support the proposition that (p. 564):

"Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute and the articles of association; but with regard to all that the directors do with reference to what he calls 'the indoor management of their concern,' that is a thing known to them and to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, *are not to be affected by any irregularities* which take place in the internal management of the company."

The application of this reasonable and well sustained doctrine is manifest. There is not in the national bank legislation any *express* power to borrow money. But the

associations have full *banking* powers. At common law and by constant and universal custom such power embraced the faculty of borrowing. This Court admits the power in the *Western National Bank* case. But it is suggested in that case that there ought to have been an order or authority by the directors. Let it be granted: yet under the authorities, *the lender has the right to presume that this was done*. Further than this: if the Act of Congress had said that the bank *may* borrow, upon such authority or direction; or even that it *shall not* borrow without it, the cases hold that when its officers *do* borrow, in the name of the bank, the lender may presume the authority of the directors.

Without further comment we refer to the following decisions additional to these, and those already cited under other heads, as confirming the propositions heretofore made:

*Smith v. Hull Glass Co.*, 11 C. B. 897.

*Greaves v. Legg*, 2 H. & N. 210.

*Mahony v. E. Holyford Mining Co.*, L. R. 7 H. L. 869.

*County of Gloucester Bank v. Rudry Merthyr, etc., Colliery Co.*, [1895] 1 Ch. 629.

*Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 266.

*Swire v. Francis*, L. R. 3 App. Cas. 106.

*Montaignac v. Shitta*, L. R. 15 App. Cas. 357.

*In re Hampshire Land Co.*, [1896] 2 Ch. 743.

*Creswell v. Lanahan*, 101 U. S. 347.

*Hanson v. Head* (Sup. Ct. N. H.), 38 Atl. 788.

*First Nat. Bank of Birmingham v. First Nat. Bank of Newport* (Sup. Ct. Ala.), 22 South. 976.

*Miller v. American Mutual Accident Ins. Co.*, 92 Tenn. 167; 20 L. R. A. 765.

And we submit that, so far as the Chemical Bank is

concerned, the authority to borrow the money must be presumed.

## V. RATIFICATION ESTABLISHED.

Thus far we have urged that the decree should be affirmed because the Chemical Bank was entitled to presume the loan was authorized. But we need not rest upon that ground solely; for the facts of the case establish ratification, both by the Fidelity National Bank before its dissolution, and by its receiver and creditors since.

Ratification is conduct of a person or his privies estopping him or them from asserting that a contract made or act done in his name was unauthorized. Ordinarily here, as elsewhere in the law of estoppel, the estopping conduct must have been done with knowledge of all material circumstances. But knowledge in this connection means not what one does know, but what he should know, that of which he has notice; and notice means information which should prompt to inquiry. If such information be given, the party receiving it is conclusively presumed to have all the knowledge which inquiry would have disclosed.

Speaking with extreme exactness, a corporation can have neither knowledge nor notice; for while in theory a juridical person, in truth it is but an imaginary being. It has no physical existence, and physical or psychical acts or powers can be attributed to it only by figure of speech. It neither sees, hears, nor feels of itself, but only through the senses of others—its agents. In every thing it acts by agents; the knowledge of its agents is its knowledge, and notice to them is notice to it.

THE LOAN WAS RATIFIED BY THE FIDELITY NATIONAL BANK  
BEFORE DISSOLUTION.

We might safely rest the claim that the Fidelity National Bank had notice of the loan that was made to it by

the Chemical National Bank upon the letter of March 2, 1887, which the cashier of the latter bank wrote to Baldwin, the cashier of the Fidelity Bank, advising him that the loan had been credited upon the books of the Chemical Bank (Rec., p. 33). Of course it will be urged by our opponents that Harper was attempting to defraud the Chemical Bank, and that Baldwin was his accomplice. The latter contention is only an inference; and if true is immaterial. For while it is now well settled that the general rule, that notice to the agent is notice to the principal, is subject to an exception in certain cases where the agent is himself perpetrating a fraud upon his principal (*American Surety Co. v. Pauly* [No. 1], 171 U. S. 133), yet this exception does not apply to those cases where the agent has been designated by the principal as the proper person to receive the very information with notice of which the principal is sought to be charged, so that the notice is received by the agent in the strict performance of his duty. To hold otherwise would overthrow the whole law of agency, and establish that loss by the fraud of an agent in the performance of his duty should fall upon the innocent third party, and not upon the principal who held the agent out as worthy of trust and confidence, and as the proper channel of communication to him. It was the Fidelity Bank that published to the world that letters sent to it upon matters of business should be addressed to Ammi Baldwin, its cashier; the Chemical Bank acted upon that invitation when it answered Harper's request by a letter to Baldwin; and the information thus given him was given to his principal, the Fidelity Bank.

There is no occasion for us to cite other authorities upon this proposition. Many are collected in the *Pauly* case. But the language of the Circuit Court of Appeals (Mr. Justice Jackson, and Judges Taft and Sage) in *First Na-*

*tional Bank of Evansville v. Fourth National Bank of Louisville*, 16 U. S. App. 1; 56 Fed. 967, is so pertinent that we can not refrain from quoting it. There a defaulting bookkeeper suppressed letters received, so as to hide his own irregularities. Nevertheless, his principal, the bank, was charged with knowledge of the contents of the letters thus suppressed. The Court, speaking through Sage, D. J., said :

“Here it was the business of Schor, the plaintiff’s bookkeeper, to receive and open and distribute letters addressed to the bank and coming by mail. Hence the Court below rightly charged the jury that if they found that the letters mailed by the defendant were delivered to him, they should find that they were delivered to the bank. Now, it is claimed that because he secreted those letters, and kept them from the actual knowledge of the bank, the bank is not chargeable with notice of their receipt or of their contents, because he had no right to secrete them, and to keep them. As well might it be claimed that the bank could repudiate a payment made to its collecting agent by its debtor, because he had embezzled it, instead of paying it over. Schor’s authority was to receive the letters for the bank, and the collector’s agency, in the case put, was to receive money for the bank. Delivery in the one case was delivery to the bank, and payment in the other case was payment to the bank, and what Schor or the collector afterward did concerned only themselves and the bank, so far as the rights and interests of the parties were involved.”

But again it is not necessary for us to stop here. Knowledge is carried to the bank and its responsible officers without being filtered through either Harper or Baldwin.

As stated heretofore, the practice between the two banks was for the Chemical Bank to render monthly accounts current to the Fidelity Bank, which would be checked over by the latter bank, compared with its books, and dis-



crepancies or other items calling for remark inquired about. So far as the Fidelity Bank was concerned, this matter was in the charge of its general bookkeeper, J. Harry Watters. The Chemical Bank furnished its account current for the transactions of March, 1887, early in April of that year; this was offered in evidence, Watters Exhibit No. 10, and will be found at the end of the record as now printed. The fourth item on the credit side of that account, under date of March 2, shows the loan here in question in the following words, "Tem. Loan, \$300,000." On his examination, prior to the first appeal, Watters said (QQ. 48-49, Rec., p. 47) that this "account current was received by the Fidelity National Bank, and turned over to me about the 4th or 5th of April. It was checked up with the books of the Fidelity National Bank, and found to be O. K." And he then "filed it away among the papers of the Fidelity National Bank."

Being recalled after that reversal and examined somewhat with reference to this account, he endeavors to justify his action in filing this account away without further inquiry or report; but his attempted justification simply confirms the proof of his carelessness; it all comes to the point that if the entry had been different from what it was it would have meant something else—a proposition which no one will dispute. He is, indeed, but quibbling upon words; for it will be seen that by the word "entry" he is speaking only of the date and the amount, and where he uses the word "explanation" he means the explaining remark—in this instance the words "Tem. Loan." But when he is pinned down to the idea expressed by *this entry with this explanation*, to use his own terms, his answer is plain and unequivocal; see Rec., p. 235:

"Q. 45. Well, Mr. Watters, when it appears on the account rendered by the Chemical National Bank to the



Fidelity National Bank as a 'Tem. Loan' does not that signify necessarily a temporary loan from the Chemical National Bank to the Fidelity National Bank? A. Yes, sir."

"Q. 50. But as it stands it signifies a loan by the Chemical Bank to the Fidelity National Bank and nothing else, does it not? A. Yes, sir."

There can be not the slightest room for doubt, therefore, but that notice of this loan from the Chemical Bank was received by Watters, the general bookkeeper of the Fidelity Bank early in April, 1887, while he was acting in the performance of his duties as an agent of that bank. And, furthermore, as he made the false entries of March 2, dictated by Harper, he had all the threads in his hand, and knew, or should have known, the whole fraud.

*The notice thus given to Watters, the general bookkeeper, was notice to all his superiors, including the board of directors, was notice to the bank.*—We have already stated briefly the rule that notice to the agent of a corporation is notice to that corporation, and the reason for it. The only question here is whether Watters was the agent of the corporation. His position is stated by himself. He was general bookkeeper and general utility clerk (Rec., p. 72, Q. 2); it was his duty to examine these monthly accounts and to supervise the correspondence resulting therefrom. (Rec., pp. 224-225; QQ, 1-5; pp. 228-233, XQQ. 2-38.) He was, therefore, the agent specially designated by the Fidelity Bank, to receive information coming in the form of an account current, and to transmit the same, where necessary, to others. If he failed in performing his duty, or was negligent regarding it, that is the misfortune and loss of the bank, his principal, whose business he was doing, not of its customer who corresponded with the bank in the regular way.

The Chemical Bank was not dealing with J. Harry Watters in the matter of these accounts. Its dealings were with the Fidelity Bank. To the Fidelity Bank it transmitted the account, which showed that it had made a loan to the Fidelity Bank on March 2, 1887, of \$300,000, and that without this loan the account of the Fidelity Bank with it for that month would have been overdrawn on March 28th by \$296,000, and on April 1st by \$332,000. This account the Fidelity Bank turned over to Watters to investigate. Whatever he learned or should have learned by such investigation, his principal, the Fidelity Bank, as a matter of law knew; and the board of directors of that bank, if they be considered its active managing body, are chargeable with, and can not escape the responsibility of, the same knowledge. No remissness, or negligence, or even fraud of Watters in performing his duty will shield them, so far as the Chemical Bank is concerned. When once it is established, as this record does establish, that the entry which we have quoted is but a short form of stating that on March 2, 1887, the Chemical National Bank loaned to the Fidelity National Bank the sum of \$300,000, the proved reception of that account at the Fidelity Bank carries with it knowledge to that bank and all its officials, that such a loan was made.

This Court has previously had occasion to pass upon questions which are identical in principle with that at bar upon this point. We have already quoted a passage from *Martin v. Webb*, 110 U. S. 7, which is in point (*supra*, p. 113). The subject was also considered in *Kissam v. Anderson*, 145 U. S. 435. There it appeared that Warner, the cashier of the Albion Bank, was engaged in stock speculations upon his own account in New York, through Kissam, Whitney & Co., brokers of that city. In the course of those speculations he sent to Kissam, Whitney & Co.

drafts of his own bank, signed by him as cashier, to their order on the Third National Bank of New York for the aggregate amount of \$103,000. The proceeds of these were applied to his stock account; and upon the other hand, Kissam, Whitney & Co. at sundry times returned to the Third National Bank sums aggregating over \$63,000, which were entered by that bank to the credit of the Albion Bank, and notice thereof was sent, in the regular course of business, by the former to the latter bank. Of these, however, only \$25,850 were charged to the Third National Bank upon the books of the Albion Bank. The Albion Bank having failed and gone into the hands of a receiver, he brought suit against Kissam, Whitney & Co. for the amount of the drafts which had been sent to them by Warner; and the Court below had held that the defendants were not entitled to credit for the moneys they had deposited in the Third National Bank to the credit of the Albion Bank. This Court held that this was error, and with reference to the particular point which we are now discussing, speaking through Mr. Justice Brewer, said, (p. 422):

“If it be said that no officer of the Albion Bank knew of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is, that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs, no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough

that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys."

In *Knights of Pythias v. Kalinski*, 163 U. S. 289, speaking as to the effect of reception of assessments by a benevolent order from a member after delinquency upon his part sufficient to forfeit his membership, this Court, speaking through Mr. Justice Brown, said (page 298) :

"Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver, when the facts constituting a forfeiture are known to the company, *Insurance Co. v. Wolff*, 95 U. S. 326; *Bennecke v. Insurance Co.*, 105 U. S. 355, this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse. In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the Supreme Chancellor of May 20, 1887, it became the duty of the keeper of the records and seal of the lodge to which Kalinski belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues, and his failure to do this should be imputed to the defendant, as representing the order, rather than to Kalinski."

In *Marsh v. Keating*, hereafter to be mentioned more specifically in another connection (*infra*, p.     ), Park, J. delivering the opinion of all the judges to the House of Lords, who adopted that opinion, speaking of the liability of a firm of bankers for money credited to their account with another bank, and shown by entry upon their pass-book with that bank, though not upon their own books be-

cause of frauds of one of their partners, said, 2 C. & F. 250, 289 (also reported in 1 Bing., N. C. 198, and 1 Scott, 5) :

"But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

"It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

"If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires."

*Having knowledge, the omission to repudiate the loan was a ratification of it.*—What occurred after the account was received has been stated in the statement of facts. (*Supra*, pp. 15-19). It was the custom, as stated, for the Fidelity Bank to write, asking explanations of matters set forth in the account which were not recognized as correct; and the explanation was written upon the same sheet containing the request and returned. Whether any explanation at all was asked early in April with reference to this account for March, as was the custom, is not proved. If such explanation had been requested, it, with the answer to it, should have been found on the files of the Fidelity Bank. It was not there, although explanations for the subsequent months were found and produced, and offered in evidence. Some

items of the account for March were unquestionably the subject of explanation, for the letter of the Chemical Bank of May 11, 1887, answers inquiries made with reference to them (Rec., p. 269). This much, however, can be affirmed as indisputable, that no question or comment was ever made as to the loan of March 2. So far as the Chemical Bank was concerned, that loan was permitted to stand as an accepted and established fact. In faith of that loan it paid checks of the Fidelity Bank against it; it gave up, in April, \$10,000 of the security transmitted with the request for the loan; it permitted the substitution of other securities in May, 1887; it made large advances in June, 1887; and by June 20, when the Fidelity Bank suspended payment, it had allowed it to overdraw, after crediting it with this loan of March and with the loan of \$200,000 in June, to the extent of \$89,000. (Armstrong Exhibit 6, Rec., p. 105.) Surely this is acquiescence on the part of the Chemical Bank, and much more. The loan was made; the money was credited to the account of the Fidelity Bank; knowledge of the loan is conclusively presumed; the money loaned was actually used and applied to the credit of obligations of the Fidelity Bank, which are admitted in this record to have been valid—for this application of the checks paid from the loan is set forth in the March account, Watters Exhibit 10, exhausting the whole amount of the loan, and Watters says that the account was checked up with the books of the Fidelity National Bank, and found to be O. K., which proves that all of these checks were regularly issued; and furthermore, the reconciliation sheet of this account (Rec., pp. 259, 260) shows that the checks drawn by the Fidelity Bank had been compared with the checks paid by the Chemical Bank, and those drawn but not presented noted (Rec., p. 159, McCauslen, QQ. 28, 29); and the reconciliation sheets for April and

May (Rec., pp. 261, 264) show that while there had been a discrepancy of \$50.50 in the February account, there was none in the subsequent ones. Hence there is proved beyond dispute not only a loan and knowledge of the loan, but actual use of the money loaned. That facts such as these establish ratification can not be questioned. We have already (*supra*, p. 139) called attention to *Kissam v. Anderson*, 145 U. S. 435, which is so closely analogous as to be authoritative, were it the only decision upon the subject. But the point presented is identical with that decided by this Court in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96. The question there presented was as to the right of a depositor to surcharge and falsify an account rendered him by his bank after he had retained it without objection longer than was reasonably necessary for its examination. It appeared that the errors claimed by him had been caused by checks raised and cashed by one of his clerks, and that the auditing of the account on its return had been entrusted to the same clerk, who, naturally, had not advised his employer of the state of affairs. The conclusion reached by the Court is accurately stated in the syllabus as follows :

"A depositor in a bank, who sends his pass book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers, and to report to the bank, without unreasonable delay, any errors which may be discovered in them ; and if he fails to do so, and the bank is thereby misled to its prejudice, he can not afterward dispute the correctness of the balance shown by the pass book."

The ethics as well as the law of the matter are summed up by the Court in the following sentence (p. 112) :



"Where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction naturally placed by the latter upon his conduct."

Previously, the case of *Burton v. Burley*, 9 Biss. 253; 13 Fed. 811, had been decided by Judge Drummond. The syllabus, which sufficiently shows the applicability of the decision, is :

"Where the president of National Bank A. instructed its correspondent, Bank B., to charge up against the former bank the amount of a private note which the latter bank held against him, in payment of said note, and this was done, and account rendered showing the transaction, which was accepted by the first bank; *Held*, that Bank A. was estopped from denying the correctness of the charge, and that a receiver subsequently appointed could not set aside the transaction."

Still earlier in *Gold Mining Co. v. National Bank*, 96 U. S. 640, 644, this Court had said :

"The judge's charge on the subject of the ratification by the company of the acts of Sabin contained all that it was necessary to say to the jury. It was, in substance, that if Sabin was the agent of the company in working its mines in Colorado in 1867 and 1868, without authority to borrow money in its name, but did in fact borrow large sums of the plaintiff in its name, if, on the 16th of December, 1868, the president of the company was informed of such borrowing and of the amounts, and a demand was made for the payment thereof, and if within a reasonable time thereafter the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to



consider the company as assenting to what was done in its name. We consider this charge entirely correct."

And in *Insurance Co. v. McCain*, 96 U. S. 84, where it appeared that the assured had paid a premium upon his policy to a former agent of the Insurance Company without notice that his agency had ceased, and that four months afterwards this ex-agent had rendered a statement to the company showing the payment, after which the company kept silent while the assured lived, this Court said :

"The law on the silence of the company, after receiving the statement of the agent that the premium had been paid, is also free from doubt. Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards."

While it is thus manifest that it is not necessary to go beyond the decisions of this Court for conclusive authority upon the exact question presented, it is not inappropriate to refer the Court to cases elsewhere supporting the same conclusion. The Court will already have observed, when reading the cases which we have cited as to the presumption of authority to make the loan, that many of them establish the sufficiency of the ratification here shown. In addition to those, we beg leave also to refer to the following :

*Ogilvie v. West Australian Mortgage and Agency Corporation, Limited*, [1896] App. Cas. 257.

*Mundorff v. Wickersham*, 63 Pa. St. 87.

*Pope v. Armsby Co.*, 111 Cal. 159.

*Busch v. Wilcox*, 82 Mich. 315.

*Hawkins v. Fourth National Bank*, 150 Ind. 117.

*Morse v. Ryan*, 26 Wis. 357.

*Thomas v. City Bank of Hastings*, 40 Neb. 501.

*Trademens' National Bank v. Bank of Commerce* (N. Y. Sup. Ct.), 6 App. Div. 358.

*Bank of Lakin v. Nat. Bank of Commerce*, 57 Kan. 183.  
*St. Paul and Minneapolis Trust Co., v. Howells*, 59  
 Minn. 295.

*International Trust Co., v. Norwich Union Fire Ins.  
 Soc.*, 36 U. S. App. 277; 71 Fed. 81.

*American National Bank v. National Wall Paper Co.*  
 40 U. S. App. 646; 77 Fed. 85.

*Dithey v. Dominion Nat. Bank*, 43 U. S. App. 613; 75  
 Fed. 769.

*Am. Exch. Nat. Bank v. First Nat. Bank*, 48 U. S.  
 App. 633; 82 Fed. 961.

THE RECEIVER AND CREDITORS OF THE FIDELITY NATIONAL BANK OBTAINED ACTUAL KNOWLEDGE OF THE FACTS, AND RATIFIED, BOTH BY SILENCE AS REGARDS THE CHEMICAL NATIONAL BANK, AND BY PROSECUTING THE DIRECTORS AND RECOVERING FROM THEM FOR NEGLIGENCE IN THIS TRANSACTION.

The Court will remember the facts: that notice of the loan was given to Armstrong, the receiver of the Fidelity National Bank, as early as July 6, 1887, if not previously (see letter of that date, Rec., p. 268); that the application to this loan of the collaterals forwarded in June led to a dispute between Armstrong and the Chemical Bank in November, 1887, in which the existence of the loan was not disputed, but merely the right to apply those collaterals toward its payment (Armstrong's letter of November 14, 1887, Rec., p. 24); that this dispute resulted in a suit brought in New York by the appellant, in which the right of the Chemical Bank so to apply the June collaterals was denied, but the existence of the loan as an indebtedness was not challenged; that previously, on September 18, 1887, the receiver had brought suit against the directors of the Fidelity Bank to recover damages for neglect of

their duties, counting, among other things, upon their permitting an embezzlement by Harper during the period covering the time of this loan of more than the sum lent, and suffering the issue of false obligations (Rec., p. 271); that during the progress of this suit, J. Harry Watters was called to the stand, and on January 19, 1889, testified fully as to the transaction here in question (Rec., pp. 206-222); that upon that bill and that testimony, the receiver, under remonstrance of only three of the creditors and stockholders, though all were notified, took a decree on April 16, 1890, against some of the directors for \$450,000 (Rec., p. 289), which decree has been satisfied; that all this was done prior to the filing of the bill in this cause; that the claim upon which the bill in this case was founded was filed with the receiver shortly before the rendition of that decree, and was rejected May 2, 1890, with a letter which did not deny, but inferentially admitted, the validity of the claim (Rec., pp. 101-103); and that the original answer filed in this cause also in legal effect admitted the validity of the claim (Rec., p. 8).

These facts, we submit, are sufficient in themselves to establish a ratification by the receiver and the creditors and stockholders of the Fidelity Bank, acting on their own behalf, since its dissolution. There was no possible theory upon which the receiver and creditors could recover against the directors for any thing done by Harper in this transaction, unless Harper in what he did was the agent of the Fidelity Bank. If he was not such agent, then his acts had in no way harmed those creditors and stockholders; and there could be no negligence of the directors in that connection, nor liability by them to the bank or those interested in it. The very assertion of such liability on the part of the directors was necessarily and unavoidably an assertion that

Harper was an agent of the Fidelity Bank in the transaction. And if his agency had theretofore been disputed in law, it could not be so thereafter ; for all the facts were then known, and proceeding upon the theory that he was an agent was a ratification. The receiver and creditors had come to the parting of the ways ; they made their election and they must abide by it. It would be a strange thing indeed if a principal could recover from a head-agent for permitting a sub-agent to transcend his powers, or from a surety for his agent upon the theory that the agent had been delinquent, and thereafter repudiate as unauthorized the very transaction because of which his recovery against the head-agent or surety was obtained. Yet these are the very propositions which must be established to defeat this claim of ratification.

The charter of the Fidelity Bank had been forfeited and the corporation dissolved on July 12, 1887, as is admitted in the pleadings (Rec., pp. 5, 17) ; thereafter the only representative of the corporation was the receiver. His action and his knowledge from that time is the action and knowledge of the corporation and of all interested in it ; so that ordinarily it would not be necessary to look beyond him. But when we see, as we do here, that he had brought this suit to enforce the liability of the directors, and had prosecuted it under the guidance of learned counsel, and—his evidence having been completed—had then received an offer of compromise, which he submitted to the Comptroller of the Currency, by whom he was directed to lay the matter before the Court ; and when we see further that on such petition to the Court, and the statement that a number of the largest creditors recommended it, the Court directed notice to be given to all claimants upon the fund, and, after hearing, ordered the compromise to be made, there being practically no re-

sistance, it is obvious that in this matter the receiver had the support and indorsement of every person who had a voice upon the subject. Nor does it alter or diminish the significance to be given to the transaction that other claims were alleged against the directors besides this. It is sufficient that *this claim* was alleged and proved and compromised. After such settlement had been made how could the Chemical National Bank maintain any action against Harper because of this transaction—aside, of course, from his indorsement upon the certificate of deposit? He did not deal with it as a principal, but only as an agent. He could be held responsible only for misrepresenting that he was an agent. And if suit were brought against him upon this theory, what response could the Chemical Bank make, when he in defense said: My principal adopted the agency and made my associates pay for permitting it?

It was long ago settled that where an agent entered into an unauthorized contract with a third party, the principal ratified that contract by collecting its proceeds or their equivalent either from the third party or from the agent. *Billon v. Hyde*, 1 Atk. 126; *Wilson v. Poulter*, 2 Strange, 859; *Vernon v. Hanson*, 2 Term, 287; *Cushman v. Loker*, 2 Mass. 106. And therefore over one hundred years ago this Court declared that where the United States sued its agent for issuing a false certificate of indebtedness, they thereby estopped themselves from denying the validity of the certificate. *Fenimore v. United States*, 3 Dall. 357. There has been no change in the law since that time. *Central Trust Co. v. Ashville Land Co.*, 43 U. S. App. 1; 72 Fed. 361; *The Farmers' & Merchants' Bank of Elk Creek v. Farmers' & Merchants' National Bank of Auburn*, 49 Neb. 379. So here, by holding Harper and his associates to account for the making of this loan, and not merely for the dam-

ages which had ensued to the Fidelity Bank by its making,—for no damages had ensued if the Fidelity Bank was not responsible upon the loan,—the receiver, creditors, and stockholders of the Fidelity Bank ratified the loan with just the same consequences as if the directors had authorized it in the first instance.

**VI. AS THE MONEY LOANED ACTUALLY WENT TO THE BENEFIT OF THE FIDELITY NATIONAL BANK, IT IS LIABLE THEREFOR EVEN IF THE LOAN WERE UNAUTHORIZED.**

The Court will remember that the proceeds of the loan were credited to the account of the Fidelity Bank with the Chemical Bank, and were checked out of that account by its authorized checks, and so went to pay its valid liabilities. Every dollar borrowed went to the use of the Fidelity Bank; and if the loan had not been credited, the same checks having been presented, the Fidelity Bank would have been indebted to the Chemical Bank in the same amount by way of over-draft. No dispute or controversy can arise upon the record with reference to these facts; the only question is whether their legal effect is in any way altered by the fact that on the same day upon which the loan was credited in New York, Harper took credit in Cincinnati for the same amount. The Chemical Bank was in absolute ignorance of what Harper had done in Cincinnati, and never had means of knowledge until the facts were developed in the litigation after the Fidelity Bank failed. This was not true as to the latter bank and its directors; for what he had done in Cincinnati was shown by their own books and papers; and furthermore, knowledge of what he had done in New York was actually given to Baldwin, the cashier, and to Watters, the bookkeeper, and

the information given to the latter remained on file always accessible.

To refuse relief because of Harper's embezzlement would be to relieve those guilty, and to punish those innocent, of negligence. Indeed, not only was there negligence with regard to the account forwarded by the Chemical Bank, but in the making of the entries whereby Harper received credit at Cincinnati for \$300,000. These were made simply upon his verbal instructions, without the production of a scrap of paper to warrant them. It is, of course, a very usual thing for funds to be transferred and credits to be given by book entries; but such transactions should be made only upon letters of advice. And it is a most remarkable thing that such a thing should be done on the order merely of him who receives the credit. It may be the duty of a clerk, from a banker's point of view, to make every entry which his superior directs him to make; in other words, he may be a mere machine. But we should very much dislike to be upon the bond of a clerk who took that view of his duties.

Assuming, however, that in the interests of due subordination it is proper for a clerk to make entries directed by his superior in the interest of that superior, and without proof other than his word, it certainly is further his duty to report what he has done to some other superior. The proposition is, we think, self-evident. Counsel for the appellant undertook to examine some of the bankers who were called to the stand with reference to this matter of transfer of funds, and to show by them that it was a common thing for a person to take credit at a bank in Cincinnati in return for a credit given to that bank in New York; and in that way to show that the Cincinnati part of Harper's transaction was not extraordinary. While they actually said that the clerk's business was to do what he was told,



yet they further said that it was extraordinary to direct the making of such an entry without producing a letter of advice authorizing the credit; and so far as they were examined by us (for we did not think it necessary to question them all upon so evident a proposition), said further that the clerk who had made such an entry in favor of his superior upon his word only, should at once inform some other superior, and should keep his eye upon the account current next sent by the corresponding bank where the counter credit was alleged to have been given. See the testimony of M. M. White, Rec., pp. 169-172; W. S. Rowe, Rec., pp. 189-191; H. C. Yergason, Rec., pp. 194, 195; G. P. Griffith, Rec., pp. 198-200.

But it matters not what Harper did at Cincinnati. His transactions there are not and can not be connected with the transactions in New York. With the former the Chemical Bank was in no way connected. At the time he made the transfer of funds in Cincinnati, he had no knowledge that the loan had been or would be made; if he trusted to its making, this was pure trust and assumption upon his part; for the only advice given of it was by the letter mailed on March 2, which could not reach the Fidelity Bank before March 4. A little appearance of connection and complication results from the form in which Harper put, and no doubt purposely put, his proceeding; for by labeling his transaction at Cincinnati a transfer of funds, he suggests to the mind the idea that there was in fact such a transfer, and therefore an identity of the funds, *i. e.*, that the money which he had credited to his account in Cincinnati was the identical money which the Chemical Bank lent to the Fidelity Bank in New York. But this is not true. Although Harper had a magician's power over his colleagues in the directory of the Fidelity Bank, he was not otherwise a master of



sorcery. By his mere *ipse dixit* he could not transfer money from the vaults of the Chemical Bank in New York to those of the Fidelity Bank in Cincinnati. The money which the Chemical Bank lent to the Fidelity Bank never left New York except as it was drawn from the Chemical Bank upon the checks of the Fidelity Bank. Indeed no money, as a matter of fact, passed in the transaction. A credit was extended by the Chemical Bank to the Fidelity Bank, and nothing more. Harper took a counter credit at Cincinnati. But to the latter the Chemical Bank was no party, and of it that bank remained in ignorance. The two transactions are altogether separate and distinct.

A very simple test shows the truth of this. Suppose Harper had died immediately after taking the false credit in Cincinnati and while it remained unimpaired upon the books of the Fidelity Bank; and suppose that in other respects this transaction remained as it happened; that the Fidelity Bank had drawn upon the Chemical Bank and exhausted the credit of \$300,000 which had there been given it. Could the Fidelity Bank have maintained for an instant that it was not liable for the return of that money so borrowed from the Chemical Bank? Evidently not. Having used the money, the Fidelity must repay it, and could not turn the Chemical Bank over upon Harper's estate, and this although Harper's estate still had a credit of \$300,000 with the Fidelity Bank. The false credit which Harper took of itself entailed pecuniary damage upon no one. It was when he began to draw upon that credit that damage arose. When this occurred, if it occurred at all, there is no proof in this record. *Non constat*, for any thing that here appears, but that Harper's account with the Fidelity Bank showed a balance to his credit of over \$300,000 until long after the account current of the Chemical Bank for March, 1887, was received. All we know upon

that subject is the statement of Watters (Rec., p. 83, Q. 106) that ultimately upon the failure of the bank in June, 1887, it was discovered that he had drawn out of his account upon his checks much more than \$300,000. But when these checks were drawn, and what other deposits were made, are matters as to which we are in ignorance. We only know that the president of the bank was very well satisfied with the state of his account (Rec., p. 180, QQ. 16-18; p. 182, XQQ. 13-15).

*Non constat* again, for any thing that appears in this record, but that on February 28, 1887, when Baldwin issued the certificate of deposit in the name of Harper, the latter had over \$300,000 to his credit, and that his account was then charged with this certificate of deposit. If so, and the burden is on the appellant to show that this was not so, that certificate was beyond question a valid obligation of the Fidelity Bank. The burden of disproving this fact is not sustained by evidence of entries on the stubs of the certificate book, throwing suspicion upon the certificate; for these might result from the carelessness of an entry clerk having charge of the certificate book; moreover, mere suspicion is not enough; the proof must go farther, and show that no consideration was in fact given for the certificate to avoid it as a valid obligation.

There could not be even a *claim* of right of action, or the slightest pretense upon which to base a demand, in favor of the Fidelity Bank against any one for substantial damages because of the entry Harper caused to be made upon its books, if that were a false entry, until he had taken advantage of it by drawing against it. Till that time, while the transaction would be criminal, it would be *injuria absque damno*. And when Harper did draw against that credit, the right of action would be only to

the extent to which he did draw, and would be against him, and not the Chemical Bank.

Thus the assumed identity and continuity between the loan made by the Chemical Bank and the actions of Harper at Cincinnati fail. As between the Chemical Bank and the Fidelity Bank, and by the action of the officers of the latter bank, it came into possession of the proceeds of that loan of \$300,000 by the deposit to its credit in the Chemical Bank; and against these proceeds the Fidelity Bank drew by the authorized drafts and checks of its officers in the usual course of business until, before the month had expired, the credit had been exhausted. If that credit had not been given it must have furnished other moneys to meet those drafts and checks. To allow the defense now interposed to succeed would, as between the two banks, be to allow the Fidelity Bank to retain the \$300,000 without any return to the Chemical Bank, upon the allegation of fact, wholly immaterial to the Chemical Bank, that an officer of the Fidelity Bank had swindled his own bank out of \$300,000, and this without even furnishing direct and specific proof that such a swindle had taken place.

Inasmuch as the loan was not merely credited to the account of the Fidelity Bank, but was drawn by it *by duly authorized checks* in the regular course of business, the case differs widely from *Western National Bank v. Armstrong*, 152 U. S. 346; for there the credit was exhausted by false and fictitious checks not issued in due course of business. Here the money loaned became as much the property of the Fidelity Bank, and as much in its possession for all practical purposes, as if legal tender money had been mailed or expressed to it, and by it physically received and placed in its vaults. And its defense is no different in legal effect than would have been a defense to such a state of facts, that after the money was received Harper had,

through advantage of his position as a trusted official, abstracted and embezzled that or other money, either by taking it directly from the vaults by theft, or by doing the equivalent by over-drawing his account. It will place the whole banking business in a very anomalous and dangerous situation if it once gets into books of authority that a borrowing bank, which has had the benefit of a loan by its application to the extinguishment of an equivalent amount of its valid obligations, can succeed in defeating its liability for the loan because its own officers robbed it. And, with all deference, it is submitted that this is all there is in this branch of the case at bar.

We have referred already to *Marsh v. Keating*, 2 C. & F. 250 (*supra*, p. 141). It is a case that in many respects, and particularly with reference to the point we are now considering, is closely analogous, and is indeed stronger against the defrauded principal than the case at bar. It grew out of the noted Fauntleroy forgeries which created so much commotion in English banking circles in the early part of this century, and a very interesting account of which is contained in Lawson's *History of Banking*, a book to which we have already referred. The importance of the questions involved led the House of Lords to request the opinion of the judges. This, as we have stated, was given by Park, J.; and their unanimous opinion was concurred in and adopted by the House of Lords. While the statement of facts is quite voluminous, the following is a fair summary, and gives the gist of the matter.

Keating, the defendant in error, was the owner of registered government annuities transferable at the Bank of England; Marsh, Fauntleroy, and others were partners, doing a banking business under the name of Marsh & Company; Fauntleroy forged the signature of Keating to a power of attorney to transfer the annuities, under which they

were sold and transferred to Tarbutt on December 29, 1819, and the proceeds were deposited with Martin & Co., bankers, to the credit of the account of Marsh & Co.; the deposit was entered in the pass-book of Marsh & Co. as "Cash per Fauntleroy," his name denoting the person who made the deposit; this pass-book was the usual book, furnished by the bank but kept in the possession of the depositor, in which the bank enters deposits as made, and which it balances from time to time; while a book of the firm of Marsh & Co., Fauntleroy was usually permitted by them to keep it locked up in his own desk; a corresponding entry should, of course, have been made in the other books of Marsh & Co.—as these should have corresponded with the pass-book,—but was not; nor did this credit ever appear upon the other books of Marsh & Co.; all drafts upon the account of Marsh & Co. with Martin & Co. had to be signed in the firm name, but Fauntleroy paid into that account, and by such drafts drew out, large sums for his individual purposes; the account between Marsh & Co. and Martin & Co. was repeatedly balanced between December 29, 1819, and September 13, 1824, when Marsh & Co. became bankrupts, this and other forgeries of Fauntleroy having been discovered; in the meantime Fauntleroy had caused the books of Marsh & Co. to be so kept as to show a credit to Keating of dividends upon all her annuities, including those which had been sold as above mentioned, as the same became due; all of the partners of Marsh & Co., other than Fauntleroy, were ignorant of his frauds until after their bankruptcy. The suit was to establish the claim of Keating against the assets of Marsh & Co. for the proceeds of the sale made by Fauntleroy under the forged power of attorney as for money had and received, and was prosecuted in her name for the benefit of the Bank of England. The judges having been called in, their unanimous opinion was given by Park, J.; in this

opinion he disposes of the question which is of interest here in the following manner (2 C. & F. 288) :

“But it is objected, thirdly, that the proceeds of the sale of stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions:—First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of 60,131*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt, (deducting one-half of the usual commission), by a check payable to Marsh and Co. into the hands of Martin and Co. to the account of Marsh and Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control as any other money paid in at Martin and Co.’s by any customer under ordinary circumstances. The house of Marsh and Co. might have drawn the whole of the balance into their own hands; if the same money had been paid into Martin and Co.’s as the produce of the plaintiff’s stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as ‘Cash per Fauntleroy,’ or because it never appeared in the house-book, or any other books of Marsh and Co., but only in the pass-book of that firm with Martin and Co., or because it never came into the yearly balancing of the house of Marsh and Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of

whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict."

Then follows the passage quoted from the same case on p. 142, *supra*. Then, after disposing of another point, the opinion concludes :

"Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A. has a right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use."

We submit that the reasoning in this case covers and goes beyond the case at bar. There Fauntleroy swelled the bank balance to the credit of his firm with the proceeds of another's property, embezzled the money, and successfully concealed his fraud until his firm went into bankruptcy—concealed it, however, through the neglect of his associates in not examining their bank pass-book, through which his proceedings might have been traced. Here, upon our opponents' contention, Harper did exactly the same thing, only in place of depositing money secured by selling the property of a customer of a firm, he deposited money borrowed in the firm name from a customer of the firm. The account current sent by the Chemical Bank answers in all respects to the pass-book entered up by Martin & Co. There was a deposit to the credit of the firm with which the rogue was connected, notice of that deposit, and embezzlement by the rogue. The only difference between the cases is one which should *a fortiori* cause the rule applied



there to be applied here, *i. e.*, that there the embezzlement was made by checking directly upon the account where the deposit was entered, while here the alleged embezzlement was made in an entirely different place, and without drawing upon the bank where that deposit was made.

The same question was before the Queen's Bench Division very recently in the case of *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40. The facts were that Allport, the manager of the defendants, induced the plaintiff to cash a check drawn by Allport, in the defendants' name, upon their bank account, telling the plaintiff he needed the money to pay wages; the check was never presented for payment; about eighteen months afterward Allport died, and it was discovered that he had misappropriated large sums of defendants' money; the plaintiff then demanded payment, and being refused, brought suit. The county judge found that Allport had no authority to borrow, and that he made this transaction to raise money to replace other money of defendants which he had stolen. The Court of Queen's Bench adopted the facts as thus stated, and found, furthermore, that the money received of the plaintiff had been paid into the defendants' bank account, and thereupon rendered judgment in favor of Reid.

Mr. Justice Charles, in the course of his opinion, said :

"In this case the money actually came into the possession of the defendants. Further, it seems that the defendants have had the opportunity of finding out where it came from, and as soon as it is established, first, that the money is actually in their possession; secondly, that they had the means of knowledge that it was in their possession; and thirdly, that it had been actually applied to the purposes of the defendants, the money received must be regarded as received to the use of the plaintiff."



Substantially the same question was before this Court in the case of the *Merchants' Bank v. State Bank*, 10 Wall. 604, which has been already so frequently alluded to. And it came before the Court again in an outgrowth from that transaction in *United States v. State Bank*, 96 U. S. 30. While the litigation between these two banks was pending, they had both brought suit against the United States to recover upon certificates of deposit for the gold there in controversy, which had been issued from the sub-treasury at Boston through a fraudulent conspiracy of Mellen, Ward & Co. and Hartwell, the cashier of the sub-treasury. Hartwell had embezzled from the sub-treasury a large amount, and lent it to Mellen, Ward & Co.; anticipating an examination, the certificates referred to in the case in 10th Wallace were procured and deposited at the sub-treasury, so as to cover up his deficit. The United States attempted to maintain their hold upon the certificates because of the prior frauds of Hartwell, but failed. This Court, having sustained the title of the State Bank and its liability as between the two banks, further sustains its title as against the United States, and after alluding to the cases of *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, and *Skinner v. Merchants' Bank*, 4 Allen, 290, as being strikingly like the case before them, continued (p. 36):

"But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property can not be held by the United States against the claim of the wronged and injured party."

The only differences that can be suggested between this case and the one at bar are first, that there the em-

bezzlement preceded the deposit; and secondly, there the embezzlement and deposit occurred at the same place, while here they did not. These, however, are distinctions without a difference. The transfer of funds, which was the first step in the alleged embezzlement, here preceded knowledge of the deposit; which was prior in point of time is not known; and the connection between the two as cause and effect was certainly as strong in that case as here. That the acts occurred at different places instead of at the same place, again makes this an *a fortiori* case as compared with that.

The familiar cases of *Louisiana v. Wood*, 102 U. S. 294, and *Chapman v. County of Douglas*, 107 U. S. 348, though not cases of embezzlement, rest upon the same base in principle, that is to say, where money is paid upon an unauthorized contract, and applied to the use of the person entitled to receive it were the contract authorized, that person will be compelled, in some form of action, to repay. And the same principle was again applied in *Logan County Bank v. Townsend*, 139 U. S. 67.

In *Blanchard v. Commercial Bank*, 44 U. S. App. 556; 75 Fed. 249, a case where money had been borrowed for the use of a bank by its president, without authority delegated for that purpose, the Court was pressed with the decision in the *Western National Bank* case to the effect that the bank was not bound by a loan made by its president without special authority, and met this claim with the finding of the Court below that the bank had received the benefit of the money borrowed, quoting from the opinion of the Court below that the lending bank had placed the loan to the credit of the borrowing bank, from which it was drawn by the checks of the borrowing bank, as in the case at bar, upon which they say that the case is manifestly different from the *Western National Bank* case, and that:

"The distinction in the facts justifies the conclusion of the Court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatecom Bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit."

*Perkins v. Boothby*, 71 Maine, 91, presented this state of facts: The defendants were a corporation whose agent, Cleasby, without authority, borrowed money from the plaintiff, giving its notes therefor, and used the money borrowed to pay its debts. The directors of the corporation had no personal knowledge of the loan, notes, or application of the proceeds, until after the corporation had ceased to do business and gone into liquidation, when they repudiated both loan and notes, but left the appropriation of the proceeds undisturbed. It was held that by thus retaining the benefit derived from the loan, the corporation became liable as for money had and received for the amount borrowed, with interest.

In *Gunster v. The Scranton Illuminating Heat & Power Company*, 181 Pa. St. 327, it appeared that Jessup was treasurer of the above named company which, for convenience, we shall call the Power Co., and was also vice-president of the Scranton City Bank, and its managing executive officer. As treasurer, on May 13, 1889, he drew a note of the Power Co. for \$5,000, and discounted it at the bank, the Power Co. being credited with the proceeds; then, likewise as treasurer, he checked upon that account to the order of New York exchange for \$6,000; and as vice-president of the bank, he paid that check by two drafts on New York, both drawn by him as vice-president of the bank to his own order individually—one for \$4,000, and the other for \$2,000. He drew the money upon these drafts and appropriated it to his own use. The bank having become in-

solvent, its assignee, Gunster, brought this suit against the Power Co. upon the note above mentioned among others. The Court below had held that inasmuch as Jessup was the only officer representing the bank who acted in the transaction, the bank was chargeable with the knowledge which Jessup had that he, as treasurer of the Power Co., had no authority to draw the check. The Supreme Court held this to be erroneous for reasons upon which we need not dwell, and then continue (pp. 338-339) :

“The real question is, in what capacity did Jessup commit the fraud? And it is clear that it was as treasurer of the appellee. It was as treasurer he presented the notes for discount, and as treasurer he drew the checks for the proceeds. Both acts were within his authority as treasurer and would have been lawful if they had been honest, but he drew the money on drafts which were the property of the company, and when he embezzled the money it was the money of the company. The bank had no part in his act, and gained nothing by it. The fraud had its inception and its consummation in acts done in his capacity of treasurer of the defendant company, and it should bear the loss.”

No diagram is necessary to show the appositeness of this conclusion to the case at bar.

Another case in point is *Bank of Lakin v. National Bank of Commerce*, 57 Kan. 183. The suit was brought by the National Bank of Commerce against the Bank of Lakin on two notes signed by the latter by its cashier. The Bank of Lakin denied the authority of its cashier to borrow the money, and counter-claimed for collateral which had been sent with the notes and collected. The Court below gave judgment for the plaintiff, finding that the money borrowed had been received by the Bank of Lakin, and that the only payment thereon had been from the collaterals. This finding was excepted to as not sustained by the evidence, which, so

far as appears from the report, was only that the notes had come by mail, were discounted in regular course, credited to the Bank of Lakin, and the proceeds in part expressed to it, in part paid on its drafts, and in part sent to its Eastern correspondent for credit to it. The judgment was affirmed. There was a suggestion that the cashier had misappropriated part of the money by purchasing property with it in his own name; but the Court said that the evidence supported the finding that the Bank of Lakin had actually received the money borrowed, and

“If so, it would make no difference that its cashier had appropriated a part of the same to his own use. A principal can not receive and retain the benefit of a transaction, and at the same time deny the authority of the agent by whom it was consummated.”

Similar applications of the rule for which we are now contending will be found in some of the cases cited under Propositions IV and V, *supra*, and also in the following:

*Bank of Commerce v. Bright*, 39 U. S. App. 483; 77 Fed. 949.

*Chemical National Bank of Chicago v. City Bank of Portage*, 156 Ill. 149.

*Johnston-Fife Hat Co. v. National Bank of Guthrie*, 4 Okla. 17.

*Conn. River Savings Bank v. Fiske*, 60 N. H. 363.

*Thompson v. Bell*, 10 Exch. 10.

*Burke v. M. L. S. & W. Ry. Co.*, 83 Wisc. 410.

*Ditthey v. Dominion Nat. Bank*, 43 U. S. App. 613; 75 Fed. 769.

We submit, therefore, that upon any view which can be taken of this case, the liability of the Fidelity National Bank is clear. The money of the Chemical Bank was ac-

tually credited to it, and has been actually applied by it to the payment of its acknowledged debts. This being so, it must account for what it has thus received. Nor does it matter what other moneys any of its officers may have stolen.

## VII. THE WESTERN NATIONAL BANK CASE DISTINGUISHED.

Having now argued the various grounds upon which the liability of the Fidelity Bank for the money loaned to it and applied to its use by the Chemical Bank should be sustained, we are prepared to consider more intelligently than at an earlier stage of the argument the difference between the case at bar and that of the *Western National Bank v. Armstrong*, 152 U. S. 346. Our opponents will, of course, contend, as they did in the courts below, that this case is controlled by the opinion in that. We submit that this is not so because :

(a.) The cases differ materially in their facts.

(b.) The *dicta* in that case, supposed to be adverse to the Chemical Bank in this, rest upon a mistaken assumption of fact.

*Differences in Facts.*—These differences, which we have noted by comparing the records in the two cases, are as follows :

(1) There, up to the inception of the transaction, while there had been solicitation by the Fidelity Bank, there had been no business relations between the two banks ; and when the money was credited the only prior transaction had been the remitting from New York of a small claim for collection. Here, the Fidelity Bank had long had a deposit account with the Chemical Bank ; each bank had collected for the other ; the Chemical Bank was one of the

reserve agents of the Fidelity Bank; and some similar transaction had previously been proposed (Rec., p. 22).

(2) There, Harper, in requesting the loan, did not ask it on behalf of his bank in terms, nor (as held by the Court below, though this Court did not pass upon this question) by implication. Here, the request was expressly made on behalf of the Fidelity Bank by Harper as its vice-president, and his action was confirmed by Baldwin as its cashier.

(3) There, the loan was on time—four months. Here, it was on demand.

(4) There, no obligation of the Fidelity Bank was transmitted with the request. Here, its certificate of deposit, signed by its cashier, was sent for credit.

(5) There, the record contained no evidence as to the scope of the powers usually exercised in the matter of borrowing money by officers of banks. Here, the record contains abundant and undisputed evidence that loans were always made on request of any active executive officer of the borrowing bank, including the vice-president and cashier, without showing authorization or ratification by its board of directors.

(6) There, the record was silent as to the powers exercised by Harper other than that he was vice-president and managing officer, *i. e.*, the general manager of the business of the bank. Here, the record shows in brief that he was permitted by the board of directors to manage the bank as he saw fit.

(7) There, all the letters from Cincinnati were signed by Harper individually; the letters from New York were addressed to Harper as vice-president. Here, the correspondence from Cincinnati relating specifically to the loan consisted of three letters signed by Harper as vice-president (one of which inclosed a certificate of deposit signed

by Baldwin as cashier), and one telegram signed Fidelity National Bank; from New York, one letter addressed to Baldwin, cashier.

(8) There, Harper purloined \$195,000 of the identical credit given, through false drafts on the Western Bank issued after receiving advice by mail of the granting of the loan. Here, Harper did not touch the credit given at all; on the contrary, he took credit on the books of the Fidelity Bank on March 2, 1887, before he knew the Chemical Bank would grant the loan; his embezzlement, if he did embezzle, would have been just as complete and effective if the Chemical Bank had never granted the loan.

(9) There, the loan actually made was drawn out, so far as drawn at all, by false drafts not appearing on the books of the Fidelity Bank. Here, every penny loaned was drawn out by regular drafts appearing upon those books, and thus satisfying unquestioned obligations of the Fidelity Bank.

(10) There, the only account transmitted by the Western Bank was for the month of May, before the drafts were drawn; and while it showed a credit of \$200,000, it said nothing as to a loan. Here, the account current for March sent from the Chemical Bank showed this credit expressly as a "Tem. Loan," *i. e.*, temporary loan, under date of March 2; it showed the drafts against the account including this credit; and further, that in spite of this credit the Fidelity Bank by April 1 had made an over-draft amounting to \$32,695.97. .

(11) There, the account current of the Western Bank which showed the credit, but *did not* specify it as a loan, was not audited by the bookkeeper of the Fidelity Bank, for he had no account with that bank on his books, but was taken by him to Harper, who kept it as a private matter of his own; thus it never got among the files and



papers of the Fidelity Bank. Here, the March account which showed the credit, and *did* specify it as a loan, was audited by the bookkeeper of the Fidelity Bank, found to be O. K., and filed with its papers; as the drafts charged to the Fidelity Bank appeared upon the face of the account, and agreed with the books of that bank, and as the balance was an over-draft by it, necessarily every cent with which it was credited upon that account, including this loan, had then been applied to its use; and whatever else Harper may have done he did not embezzle any part of this money.

(12) There, no usage had grown up between the banks as to such accounts, for this was the first of its kind. Here, there was such a usage by which the Fidelity Bank was required to note and report differences, with request for explanation as to matters not understood. No inquiry or allusion as to this loan was ever made by the Fidelity Bank, although it continued in business more than two months after receiving the account advising the loan, and although it made inquiry as to other matters appearing in that account. (Quinlan's answer of May 11, 1887, Rec., p. 269.)

(13) There, the position of the Western Bank was in no way altered by any action or non-action of the Fidelity Bank; the first two drafts were paid on June 3 and 4, before the account could have been returned audited; and the last draft was not paid until June 17, after the enlightening letters of June 9 and 13 had been received. Here, the position of the Chemical Bank was materially changed. Not only was recourse against Harper, who was then in good credit, lost, but The Jung Brewing Company note for \$10,000 of the first collateral had been given back without substitution after the usual time for the report upon the account current for March had expired; on May

23 an exchange of collateral was made; the regular business between the banks continued; monthly accounts were rendered, compared and advised upon; in June a further advance was made by loan and over-draft, amounting to more than \$300,000; and the Chemical Bank has given up the June collateral and collections, which it could not hold to secure the March loan, but might for the over-draft resulting from repudiating that loan.

(14) There, no evidence was offered tending to show ratification by the receiver or creditors or stockholders of the Fidelity Bank. Here, such ratification is established not merely by their long acquiescence, and the direct acknowledgment of the receiver of the existence of the loan, but by their pursuing and recovering from the directors for suffering the loan to be made.

To sum up these differences in a few words, they are as follows:

(a) There, no evidence appeared to show a loan was authorized. Here, such evidence does appear.

(b) There, it appeared affirmatively that the Fidelity Bank did not get the actual benefit of the money loaned. Here, it appears affirmatively that it did get that benefit.

(c) There, there was no evidence of ratification. Here, there is abundant evidence of it.

(d) There, the result reached was correct, for the reason assigned by the Court below—that the request, on its face, was not for a loan to the Fidelity Bank, but for a discount for E. L. Harper. Here, Harper individually had no apparent connection with the transaction requested.

With such differences as these existing, we submit no justification can be found for a claim that the decision in the *Western National Bank* case is controlling here.

*Dicta rest on mistaken assumption.*—The following quotations from *Western National Bank v. Armstrong*, 152 U. S. 346, 350, give fairly, we think, the essential parts of that opinion bearing upon the power to borrow money :

“There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time.” . . .

“The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It can not be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months time.

“It might even be questioned whether such a transaction would be within the power of the board of directors.”

The Court then quotes from the eighth section of the National Banking Act (Rev. Stat., sec. 5136, par. 7), and continues :

“The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted.”

Then, after quoting from *First National Bank v. National Exchange Bank*, 92 U. S. 122, 127, a passage included in that we have quoted *supra*, p. 86, showing that by necessary implication a bank has power to incur liabilities in the regular course of its business, the Court continues :

“Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

“Even, therefore, if it be conceded that it was within

the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally as obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

The conclusion thus reached by the Court rests, it will be seen, entirely upon the premise stated by it, that: "The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted." Upon this foundation is built the superstructure, first, that the temporary borrowing of money is "out of the course of ordinary and legitimate banking;" and, secondly, that special authority is essential to validate such a loan. If the major premise, the foundation of the argument, be unsound, the whole structure falls.

This premise is manifestly a statement of fact. Such statements are conclusive only as to the particular case in which they were made. However positively asserted, they are never more than persuasive in other cases; they can not be conclusive upon even the same tribunal in such manner as to prevent it from seeing a manifest error disclosed by further illumination of the subject. Witness the decisions of this Court in *The Genessee Chief*, 12 How. 443, and *Pollock v. Farmers' Loan and Trust Co.*, 158 U. S. 601.

As we have said, what is embraced in the business of banking is a question of fact, not of law. Its solution depends upon the usage of bankers, what they are habitually or commonly accustomed to do. This is different from the question as to what may be the powers of any particular bank. The latter will depend upon whether the bank be created by statute, or by private agreement between individuals, or be the property of but one person, and will

involve questions of law as to the interpretation of such statute or agreement. But *the banking business* means the business transacted by banks generally, no matter how created; and what that business is, depends simply and solely upon what banks are accustomed to do. Whether any particular bank can do every thing germane to the banking business, depends upon the charter or other constating instrument creating that bank.

It will be observed that this Court in the *Western National Bank* case does not find any limitations upon the borrowing power imposed in terms or by implication by the National Banking Act. It rests its conclusion solely upon the ground that borrowing is not incident to the banking business, or to use the words of the Court, is "out of the course of ordinary and legitimate banking." This is simply and purely a question of fact. Its existence is not affected nor conclusively disproved by a statement in the opinion of any Court, no matter how weighty or deserving of respect the pronouncements of that Court may be. One seeking to learn what is, in truth, within the course of ordinary and legitimate banking, will not rest with the assertion of any one man or any one tribunal, but will test that assertion by examining the nature of the business and the manner in which it is actually done; what history tells us as to how it has been done in the past; and what judicial opinions and legislation show us has been heretofore considered incidental, usual and necessary in that business.

From these sources of information we have garnered; and the fruits thus stored we have spread before the Court. It thus appears that from time immemorial borrowing has been a matter of course in banking, borrowing in all its forms; that it has been the uniform custom for one bank to lend to another on the application of either president, vice-

president, when actively engaged, or cashier of the borrowing bank ; that when the power has been the subject of legislation, it has been either expressly granted, or plainly recognized by limiting its abuse ; and that the Courts have held it to be incident to the banking business.

Considering that transactions like that at bar had been sustained by repeated decisions of the Court of Appeals of New York, where the lending bank was located, and by the Courts of last resort wherever else such questions had been submitted, and had been inferentially approved by the Supreme Court of Ohio, where the borrowing bank was located ; and consequently that had the question of the validity of this loan been submitted to counsel for advice at the beginning of negotiations, the opinion, whether given by members of the bar of New York City, or of Cincinnati, must have been that the transaction was entirely regular, to hold now that such a loan was invalid will be more than a surprise. Such a ruling will extend far beyond the narrow circle, relatively, of the banking business, and will disturb the views that have hitherto been entertained in the whole field of corporate agencies. It will endanger and unsettle vast interests and obligations to an extent seldom worked by a judicial determination.

And if to this be added a further ruling that not only was the loan so beyond the scope of apparent authority as to require evidence of special authorization, but that upon the facts in the case at bar it never has been ratified nor applied to the use of the borrowing bank so as to make it liable therefor, and that the appellant, as receiver, may keep \$300,000 of money loaned by the Chemical Bank in good faith and according to established usage, a custom and usage approved and confirmed by a long line of judicial decisions, then, we submit, that neither the business community,

nor the legal profession in advising business men, can say what landmark of the law can thereafter be considered immovable.

### VIII. EFFECT OF COLLATERAL UPON BASIS FOR DIVIDENDS.

The recent decision of this Court in the case of *Merrill, Receiver, v. First National Bank of Jacksonville*, Nos. 54 and 55 upon the docket of the present term, relieves us from any discussion of the third, fourth and sixth assignments of error. That case was decided by the Court below upon the authority of the decision of the Court of Appeals in the case at bar. The arguments there, so far as this question was concerned, were by counsel now before the Court. The Court has expressly approved the reasoning and the conclusion reached upon this question by the Circuit Court of Appeals in the case at bar. In view of these facts we do not consider ourselves at liberty, without invitation from the Court, to discuss again matters so recently argued by our opponents as well as by ourselves, and so thoroughly considered by the Court. The decision there made by this Court,—that dividends must be declared upon the amount due upon the claim as it stood at the date of the declared insolvency of the failing bank, without regard to what collateral security the creditor may then have held except so far as necessary to show when his claim is paid in full,—not only relieves us from discussing, as we did in that case, which of the four rules for distribution of assets should be applied to an insolvent national bank, but renders it needless for us to debate other questions which might have been pertinent had the Court held that any of the other rules than the one adopted should be applied, and from urging here, as we did below, that under any of

the other rules the result reached in this case would have been substantially the same, because the collaterals which were collected before proof of claim were not the property of the Fidelity Bank, and were used by Harper in breach of trust, so that the debtor thereon would himself have had a right of action against the Fidelity Bank in so far as he might be compelled to pay the same to the exoneration of that bank; and for the same reason, if we admit that part of that collateral was lost through negligence, this negligence caused no damage to the Fidelity Bank.

### IX. INTEREST ON DIVIDENDS.

It has been settled that where a claim against an insolvent national bank has been disputed by its receiver and is afterward judicially established, the claimant is entitled to interest upon the dividends declared in the meantime from the date of their declaration. *Armstrong v. American Exchange Bank*, 133 U. S. 433. As the statutes direct no form in which claims must be proved upon presentation to the receiver, but merely require him to pay ratable dividends "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction" (Rev. Stat., sec. 5236), we had supposed that any form of presentation which acquainted the receiver with the existence of the claim was sufficient unless he demanded further particulars; that the object of the statute was to enable the receiver to determine approximately the amount of the claims that existed, so that in declaring dividends he might have regard not merely to the claims which were established to his satisfaction, but to those which might be established against his will, and thus to secure equal treatment ultimately for all. Hence, as *Armstrong*, the receiver, was advised of the existence of this



claim as early as July 6, 1887, if not before (Rec., p. 268), and as, in his letter of November 14, 1887 (Rec., p. 24), Armstrong, being then fully advised as to the facts, did not dispute the validity of the claim, but only the right of the Chemical Bank to pay it from the proceeds of the June collateral, we had contended in the Court below that the Chemical Bank was entitled to interest upon dividends from the date of their declaration respectively, although it had made no formal proof of its claim until 1890 because it believed until that time that it had a right to apply the June, as well as the March, collateral to the claim, and that in that way it had received payment in full. The Court below, however, held formal proof of claim was necessary to start interest upon dividends, and that the Chemical Bank, as to dividends declared before it filed such formal proof in April, 1890, could receive interest only from that date. That bank has taken no appeal from this decision, so the matter is not open here for debate. We state it only to advise the Court as to the discussion below.

Our opponents contend, however, that the answer of Armstrong (Rec., p. 101) to the Chemical Bank's proof of claim precludes that bank from receiving interest upon dividends on \$200,000 of its claim.

The Chemical Bank refused to accept the proposal made in that answer because its counsel thought the proposal hazardous, in that its acceptance would have involved splitting an entire claim, and in effect putting part of it into judgment (*National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S. 437), and thus giving persons having opposing rights the opportunity to say that the balance of the claim was waived,—making the very argument which was made by one of our opponents in *Merrill v. National Bank of Jacksonville*, No. 54 of the docket of this Court at this term (see pp. 7 and 8 of Mr. Oldham's brief

in that case); and that the proposal was unfair, not only in that it involved a promise of restitution which the receiver had no right to require, but a further promise that if the Court should hold that the dividends should be computed according to the *Kellock's* case rule (to give these rules the names that were used in the argument of the *Merrill* case just mentioned), yet settlement should be made as if the bankruptcy rule were the one to be applied. And when this cause was heard in the Court below, we urged not only these matters, and that the offer was not in itself such a tender as could stop the rights of the appellee to interest, but that when the amended answer was filed and the validity of the claim *in toto* was attacked, the offer was necessarily withdrawn and lost whatever force it might otherwise have had; and we suggested that if the Court were not satisfied with the correctness of this last position, should they determine to remand the cause for the purpose of taking additional evidence as to the validity of the loan, they should also permit evidence to be taken as to the negotiations between the parties with reference to this subject.

The Court below held that our position as to the effect of filing the amended answer, and thus attacking the validity of the loan, was well taken, saying (31 U. S. App. 65, 82):

"We quite agree with counsel for the Chemical Bank that the raising of such an issue must be considered to be a withdrawal of the previous offer by the receiver, and therefore that the offer can not now be used as a ground for refusing the payment of interest upon dividends upon the whole claim for the period after April 25, 1890, when the claim was presented and rejected, down to the time when such dividends shall be paid."

In view of this we consider it hardly fair to suggest,

as do our opponents (their Brief, p. 108), that the Chemical Bank made no answer to Armstrong's offer, nor attempt to remove any obscurities in its language. As a matter of legal duty or moral obligation, we do not suppose our client was called upon to give other answer than the record shows. But however that may be, it is very certain that there was no occasion to introduce into the record proof as to what action was taken when we see that after an allegation of this offer had been made in the original answer (Rec., pp. 11-12), coupled with a practical admission of the validity of the claim, this allegation and admission were both suppressed in the amended answer, and issue taken there upon the validity of the loan (Rec., pp. 17-20).

Counsel for the appellant in effect urge that the Court should relieve him from the consequences of the election he thus made at the beginning of the litigation, and should guess what would have been the length of the litigation if he had continued upon the line of defense suggested in his original answer, and to deny the appellee interest for that period. The statement of such a claim is, we submit, its sufficient refutation. Never before, we suppose, was it seriously contended that a conditional offer to pay *part* of a valid claim must be accepted under penalty of losing interest upon the part included within the offer. And when to such a contention—for that is all Armstrong's offer to pay dividends amounted to—is added another, that such an offer remains effective to stop interest even after the validity of the whole claim is denied, then it stretches credulity to suppose that the contention is seriously made.

## X. REVIEW OF BRIEF FOR APPELLANT.

We have been compelled to postpone discussion of our opponents' brief upon the merits of the case till this time, as we did not receive it until our own had been completed up to page 161 *supra*, and partly printed.

The second and third heads of their brief, contained in pages 53-107, which discuss the basis for dividends, and were, as we understand, prepared and printed before the decision of this Court in *Merrill v. National Bank of Jacksonville*, No. 54 upon the docket of this term, was announced, require no comment from us, for the reason we have stated *supra*, page 161. The argument by them made is substantially the argument presented by the same counsel in the *Merrill* case, and is answered by the decision in that case.

While we think we have anticipated substantially all of their argument as to the liability of the Fidelity Bank, we trust we may be pardoned for adding to this brief, already unusually lengthy, some words of comment upon matters they have presented and authorities they have cited.

In the first place there are some errors in statements of fact to which attention should be called.

On page 4 they say that on February 28, 1887, "E. L. Harper did not have \$300,000 to his credit in the [Fidelity] bank, and he had not deposited that sum, or any part of it, as the basis of such a certificate," and, on page 17, they repeat the statement that he had deposited no money as a basis for the certificate. The evidence does not establish these facts. All that there is directly upon the subject is in question 27 to J. Harry Watters and his answer (Rec., p. 74) :

"Q. 27. What paper or obligations, if any thing, was given by Mr. Harper to the Fidelity National Bank at that time? A. There is none that I know of."

This is not proof that at that time Harper did not have more than \$300,000 to his credit upon the books of the bank.

At the bottom of page 25 they suggest that Harper's activity in the management of the Fidelity Bank was entirely unknown to the Chemical Bank, so far as the testimony discloses. Considering that the dealings between those banks had begun with the birth of the Fidelity Bank, and that Harper's dominating sway had begun at the same time, as this record shows, we submit that the proof is amply sufficient to raise the presumption that the Chemical Bank was well acquainted with the fact that he was at least an *active* officer. And his own correspondence with that bank furnishes confirmation.

On page 48 it is intimated that Harper may have had telegraphic information on March 2d that the Fidelity Bank had granted the loan. There is no warrant in the record or elsewhere for this supposition. The only information given by the Chemical Bank upon this subject at that time was its letter of that date.

On p. 10 our opponents say (*italics* theirs): "The Chemical Bank knew, as admitted by its president and its cashier, that E. L. Harper had *not* deposited \$300,000 in the Fidelity." At the bottom of p. 14 they say that as both of these officers "knew exactly what the certificate of deposit meant, it has no legal significance in this case." And on p. 17 they contend that these officers must have known that the certificate was irregularly issued and stated an untruth; and having been issued merely for the

purpose of borrowing money that they must be charged with notice of the subsequent use of the money obtained by the use of the certificate. The claim of counsel attributes more knowledge to the officers of the Chemical Bank and charges them with more admissions than the record warrants. It is true that those officers, as well as others, say that certificates of deposit are very commonly forwarded with applications for loans; and that it is also common in such cases to issue such certificates without there being a real deposit to support them. But these facts alone are not sufficient to charge the officers of a lending bank with notice that any particular certificate does not represent a real transaction. The certificate is a negotiable instrument, and with reference to it, as to all other instruments of its class, to charge a purchaser with knowledge of facts impeaching its validity it is not sufficient to show that he knew matters which should have made him suspicious; where the instrument is regular upon its face, the proof must go farther and show actual knowledge of the invalidity. *Goodman v. Simonds*, 20 Howard, 343. With reference to certificates of deposit received under such circumstances as this one was, the testimony of the officers is that when such documents are presented to them, they know nothing as to the facts with reference to their issue; they take the instruments at their face for what they represent, and know nothing as to what occurs at the other end (Rec., p. 44, XQ. 156; p. 126, XQQ. 17-18; p. 133, XQ. 25). This they are justified in doing for the reasons just mentioned. Indeed from a banker's point of view, there is nothing irregular or suspicious in a certificate of deposit sent with an application for a loan. This will be apparent upon reading the testimony of the bankers who uniformly speak of such a document as being one of the customary evidences given in effecting a loan. Presump-

tively, therefore, it is not an irregular instrument, but one duly authorized. Whether consideration were given for it or not by the person in whose favor it is drawn is purely a matter of form. If he made such a deposit, he has lent his money to the bank, and also his credit, by allowing them to use the voucher they gave him. If he deposited no money, then the certificate is but the equivalent of the note of the bank upon which he is an accommodation endorser.

The further contention above mentioned, that the Chemical Bank, having knowledge that the certificate was issued merely for the purpose of borrowing money, must be charged with notice of the subsequent use of that money, presents a clear case of *non sequitur*. Knowledge that money was being borrowed would not carry with it notice of the use subsequently to be made of that money. We may add, however, that the Chemical Bank in fact did see to the subsequent application of the money which was borrowed, paid it out only upon checks of the Fidelity Bank, and reported these payments; and that each payment so reported was confirmed as authorized.

The case of *Farmers' & Merchants' National Bank v. Smith*, 23 C. C. A. 80, which our opponents have cited in this connection, lends them no support, but on the contrary is adverse to their views. The ground upon which that case was decided was that the act done was *ultra vires* as to the bank itself, and therefore necessarily beyond the apparent scope of the authority of one of its officers. The reasoning concedes that had the act been within the power of the bank, it would have been bound. The case is officially reported in 40 U. S. App. 690.

It is suggested that the witnesses as to custom were from lending banks only, and that they were indifferent as to authority as they took collateral to make them

safe ; and further, that even they said it would be improper for the executive officer to effect the loan without conferring with his directors (Brief, pp. 19-24). The answer to this argument was very satisfactorily given by the Court below (Rec., pp. 344-345).

But in addition we may add with reference to the suggestion as to the collateral, that it is the habit of banks to take collateral to secure loans whether the loan be to an individual or to a corresponding bank. The argument of our opponents necessarily concedes that the lending bank would acquire good title to the securities pledged as collateral, and could indemnify itself out of them without regard to the responsibility or the legal liability of the borrowing bank for the loan as an obligation. This concedes the whole ground so far as the pledged collaterals were assets of the borrowing bank. The same agent who could *give a valid pledge* of them to raise money can *promise to repay* the money ; and it is difficult, if not impossible, to see how the debtor bank can be any more injured by holding it directly liable for repayment than by holding that its assets may be devoted to such repayment by the pledgee.

Further, this whole argument as to custom shows a complete misapprehension of the nature of the question to be answered. That question is, not what is the custom in the internal management of the borrowing bank, but what authority does custom require the officers of the borrowing bank to show to the lending bank ; in other words, what by custom is the apparent scope of authority of a bank officer. It is no answer to this to show what real authority a bank officer should get before he attempts to exercise his apparent authority. Of course no honorable bank officer would borrow money for his bank without first consulting his board of directors, where such consultation was practicable. But whether, having obtained their ap-



proval, he is required to communicate that approval to the lender, or the lender is required to demand proof of it, is a very different matter, and is the very matter with which we are now concerned. To repeat, the focus of observation is not the office of the Fidelity Bank in Cincinnati, but of the Chemical Bank in New York; and the question is, whether, upon the information submitted to it, that bank, by the custom of bankers, was justified in believing the request made to it for a loan to be authorized. To that question but one answer can be given.

It is suggested (Brief, p. 25) that such a custom was illegal in its inception, and can not become legal through age. Surely this claim was inconsiderately made. No statute is referred to declaring the custom illegal. It was in vogue, as reported decisions show, long before the National Banking Act was passed. And that it is not unreasonable is shown by the fact that it is but the application to banks of a principle well established with reference to other corporations that have occasion to borrow money; and indeed is no more than the doctrine running through the whole law of agency, that whoever employs a general agent empowers him to do all things that such an agent generally does. To the query put by our opponents as to how banks are to protect themselves, we suggest that the remedy is for them to employ honest agents, put them under bond if need be, and if they do not do that, at least to watch the accounts of their correspondents. And if their agent deceives them, let them pay the loss rather than try and throw it upon another.

The argument made on p. 28, that the Chemical Bank in making the loan did not rely upon any apparent authority conferred by the directors, could have been made as well in any of the cases which we have cited upon that

proposition. This alone shows its fallacy. If the directors had exercised proper supervision and control, Harper would not have undertaken the things he did.

And even were there force in the argument, still it does not meet the other proposition that the neglect of the directors, their abdication in favor of Harper, was the cause why they did not discover what he had done. The Chemical Bank certainly did rely upon the effectiveness of the notice it had given that it had made the loan as requested; and because of this reliance, and upon the faith of it, it paid drafts, exchanged securities, and made further advances, which it never would have done had Harper's acts not been suffered to appear as those of his bank.

The whole argument of our opponents upon the subject of ratification (Brief, p. 29, *et seq.*) is based upon the fundamental misconception that *actual* knowledge of the material facts must be brought home to the directors. Such is not the law; for while it is commonly said that there can be no ratification without knowledge, yet this is always with the qualification implied, if not expressed, that notice, which if pursued would lead to knowledge, is equivalent to knowledge, and that it is sufficient if this notice be given to an agent while in the conduct of his principal's business. Neither Mr. Meacham nor Mr. Morse is gifted with the superhuman faculty of expressing every thing relating to the subject in one phrase. What they say in the sections quoted on pages 32 and 33 of our opponent's brief is to be taken in connection with what they say elsewhere as to the effect of notice to an agent; see Meacham on Agency, secs. 718, 731, and Morse on Banking (3d ed.), secs. 98(k), 107.

There is nothing in any of the decisions which have been cited by our opponents which is either inconsistent with

this proposition, or with any part of the argument we have made. In some of them the principal having authorized his agent to do a specific thing, and no more, the agent has undertaken to make a collateral contract ; and it has been held that the principal who receives and retains the proceeds of the transaction which he has authorized, without notice of the collateral contract, is not bound thereby. We do not dispute this proposition ; the making of the collateral contract was not within the apparent scope of authority of the agent ; and in receiving from the agent what he did receive, the principal was receiving only what he had a right to expect to receive under the authority previously given to the agent. The distinction between such cases and that at bar is carefully pointed out in the opinion in *Smith v. Tracy*, 36 N. Y. 79, 82-84, which is one of the cases of this class cited by our opponents. Another is *Wheeler v. N. W. Sleigh Co.*, 39 Fed. 347.

Another class of cases cited by them is where an agent, having made an unauthorized transaction in his principal's name, pays over the proceeds to his principal upon an indebtedness of his own to the principal—the latter receiving them without knowledge or notice of the real consideration moving to the agent. And it is held that the principal who receives money from his agent in settlement of a known existing liability is not chargeable with knowledge of any fraud committed by the agent in obtaining the money. Within this class fall *Thatcher v. Pray*, 113 Mass. 291 ; *Baldwin v. Burrows*, 47 N. Y. 199 ; *Bohart v. Oberne*, 36 Kan. 284. These cases are altogether different from that at bar. There the transactions between the agent and the principal were actual transactions, the agent in person dealing with the principal in person, or with some other representative of the principal. Here the only transactions between Harper and his principal, connected in any way with the case at bar,

were by and through Harper only ; that is to say, Harper individually dealt with Harper as agent for the Fidelity Bank. The difference between the two classes of cases is pointed out in the very thoroughly considered opinion in *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268.

Another class of cases cited by our opponents is only to the effect that the burden of proof to show knowledge or notice requisite to ratification is upon the person claiming ratification. Within this class fall *Combs v. Scott*, 12 Allen, 493, and *Murray v. Nelson Lumber Co.*, 143 Mass. 250. While the authorities are not unanimous upon this as a proposition of universal application (see *Patterson v. Robinson*, 116 N. Y. 193), yet we have no quarrel with it here. The cases cited in its support only tend to show that no duty rests upon the principal having no notice of irregularity to inquire whether there was irregularity ; they in no way tend to show that a principal, who through himself, or his agent, has notice of an unauthorized act of which he is reaping the benefit, can use the crop without being chargeable with all the knowledge which pursuit of the notice would bring him.

*First National Bank v. Hanover Bank*, 66 Fed. 34, and *State National Bank v. Newton National Bank*, 66 Fed. 694, cited by our opponents, were cases where an agent having contracted a debt upon his own responsibility, assumed in the name of his principal to guarantee the payment of it. They fall within the principles settled by *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557. No one lending money to an agent, or dealing with an agent on his own individual account, can safely trust his representation that he can pledge his principal's credit in the transaction. But that is not the case at bar ; those cases would have been applicable to this if the loan here had been made to Harper individually upon his individual re-

sponsibility, although the proceeds were credited to the Fidelity Bank. But the loan was not so made, nor was there any pretense that the Chemical Bank gave credit to Harper as an individual.

*Schutz v. Jordan*, 32 Fed. 55, was decided simply on a question of pleading, viz.; that the suit was for goods sold and delivered. The Court expresses no opinion as what would have been the result had the suit been in trover for conversion, or in *assumpsit* for money had and received.

In the *Phosphate of Lime Co. v. Greene*, L. R. 7 C. P. 55, so far from its being held, as one might suppose from reading the quotations in our opponent's brief (p. 35), that actual knowledge in the principal—if an individual, or in its immediate representatives—if a corporation, was necessary, the decision was that the notice which was given to those representatives was sufficient to carry with it knowledge, because it suggested an inquiry which would have led to knowledge. In other words, the statement in an account furnished stockholders that certain shares of the stock of the company were in its name as "Shares forfeited for non-payment of calls," was sufficient to impute to those stockholders, assembled in corporate meeting, knowledge that those shares had been received from promoters in compromise of a liability of the promoters to the company for borrowed money.

We have already (*supra*, p. 136) referred to *American Surety Co. v. Pauly*, 170 U. S. 133, and there is nothing in that case inconsistent with our contention. It presented a totally different state of facts and called for a different rule of law.

Our opponents in discussing the notice given by the account current for April (Brief, pp. 42-45), are compelled

to urge that one who receives an account is obliged to notice only the charges against him, and may disregard the credits given him. This is, truly, a novel theory, and shows the straits to which they are reduced. In brief, it is that one who receives information telling him his own books are falsely kept may safely disregard that information. Surely, such a claim needs no argument to refute it; and if it were necessary to refer to authority, *Kissam v. Anderson*, 145 U. S. 435, and *Marsh v. Keating*, 2 C. & P. 250, were both cases where, as in this, the notice was given by an entry upon the credit side of the account.

Our opponents also ignore the significance of the reconciliation sheets and correspondence after the receipt of the account for March. As we have stated, these show that other matters in the March account, were the subject of correction; and this was proof of the strongest nature to the Chemical Bank that this particular entry was approved and confirmed. Whether these letters and accounts were matters which would ordinarily have been submitted to the inspection of the directors, had they indicated nothing irregular, is not, as our opponents seem to think, the real question at issue; but whether they *should* have been submitted to the directors, since they *did* indicate irregularities. The directors put their subordinates in office and devolved part of their own duties upon them. By so doing, they make the bank responsible for the neglect of their subordinates; and they are fully chargeable with notice of what they would have learned had they been performing the duties which they cast upon their subordinates.

In discussing the question of ratification and our contention that the receiver ratified the loan by the Chemical Bank to the Fidelity Bank, counsel for appellant concede

that the receiver brought suit against the directors for having been

"negligent in attending to their duties, and in the continued employment of Harper. This it was his duty to do. He also named *the present alleged loan as one of his fraudulent acts*. That suit was not to recover from Harper *the amount of that loan as having been paid to him*. It was for *damages growing out of his fraudulent acts*, and could not in any way affirm and legalize what would otherwise be illegal. . . . The suit was for damages done to the bank by the negligence of the directors. This suit was compromised by the payment of \$450,000, by the directors. . . . This damage was done to the bank whether this claim is a valid or an invalid one. In either case this act was a factor in bankrupting the bank and a subject for damages against the directors for placing Harper in the position which he occupied." (p. 47, *italics ours*.)

We have already argued that there could be no claim for damages because of the making of this loan unless by its making the loan became a liability; for without liability there was no damage. But these remarks of our opponents tempt us to a further discussion of this subject.

That negligence, as alleged in the bill, consisted in committing all power to Harper and allowing him to conduct and operate the bank without superintendence or control. It is impossible to see how their negligence, or the "fraudulent acts" of Harper in the matters now under review, could have damaged or injured the bank unless the bank was legally bound to repay to the Chemical Bank the loan made by it to the Fidelity Bank. If not so bound, it was quite sufficient that the Fidelity Bank, or the receiver as its successor and representative, should refuse payment. If that refusal be correct and be sustained by the courts, the bank was in no degree damaged.

But the receiver did not take this view of the situation. He goes into Court with an allegation of damage, and gives this loan as one of his items of damage. To simplify the matter, suppose this loan had been \$450,000, and had been the only item of damage. The receiver gets the full amount from the directors, and if he succeeds in defending an action by the Chemical Bank to recover the loan, the result would be that not only would the Fidelity Bank have suffered no damage, but clearly the receiver would have made for the bank \$450,000.

If the receiver's contention that the loan was unauthorized be well founded, he had his election to reject the claim and stand by his rejection, or to waive the alleged irregularity, concede the liability of the Fidelity Bank to the Chemical Bank, and sue Harper and his co-directors for damages caused to the Fidelity Bank by negligence and fraud. But he can not have both remedies. He has elected to ask for damages, and obtained them. That he secured them by compromise instead of judgment is wholly immaterial. The action for damages was an irrevocable election, and the amount paid was in satisfaction of the claim set up in the receiver's bill in equity.

In the receiver's bill of complaint against the directors, he charges that Harper converted to his own use "very large sums of *money belonging to said association*, . . . but he avers the aggregate amount thereof to be not less than the sum of \$500,000," and that he and his co-defendants "did issue the drafts, bills of exchange and other *obligations* of said banking association," for which it received no consideration, and which they converted to their own use (Paragraph 21 of Bill, p. 284 of Record); and that Harper was allowed absolute control of the bank (Par. 20, p. 283, and Par. 23, pp. 284-285 of Record).

It is thus seen that in that suit the receiver charged



Harper with embezzling and converting to his own use *the money and assets of the association*, and it is admitted that one instance was the manipulation of the loan of the Chemical Bank to the Fidelity Bank.

He could not have converted to his own use the money of the Fidelity Bank unless the money belonged to the bank and not to him, nor did he embezzle the money of the Chemical Bank. The money could not have belonged to the Fidelity Bank unless the loan by the Chemical Bank vested title in the Fidelity Bank. When title vested in the borrower the obligation to repay attached.

The two remedies, repudiating the debt, and suing the directors for damages, are so palpably inconsistent that they can not co-exist for a moment.

It can not be said that the doctrine of election applies only as between two or more affirmative remedies, and not as between an active remedy and a decision not to recognize and pay a demand. The equity of the doctrine is the same in either case, the reasons for it just as strong. Moreover, the appellant is pursuing an affirmative remedy in this action. He seeks to recover \$100,000 of the Chemical Bank. For the protection of appellant the decree of reversal, allowing either party to take additional testimony, was so framed, "That if the issue be decided in favor of the receiver, the bill should be dismissed, and a decree entered in favor of the receiver for the restitution of the \$100,000 paid by the receiver July 25, 1892, to the Chemical National Bank on the faith of the decree below."

There has therefore been, by the bill against the directors: (1) A complete election, and (2) a complete admission of the liability of the Fidelity Bank, by the allegation of *ownership* of the funds, and *damage* by their abstraction. The Fidelity Bank could not have been the owner of the funds realized by the Chemical loan, nor damaged by the

embezzlement of those funds, unless it was legally bound to pay the loan.

In discussing Harper's fraudulent method of obtaining the ability personally to reap the benefit of the loan of \$300,000 made to the Chemical Bank by the Fidelity Bank, counsel for appellant, in the course of describing it, say (p. 49): "The transfer of the funds to Harper was made in the regular mode of doing business. . . . This was no remarkable or unusual act of the vice-president of a bank." Then, after referring to the testimony of the witnesses as to the manner of making such transfers, they say again (p. 50): "There was nothing, therefore, unusual in this mode of transferring the funds." Then, after referring to some cases upon which we have already commented, they continue (p. 51): "The proceeds were placed to its credit by the Chemical; by transfer of funds the proceeds were credited to Harper and then checked out of the Chemical in the regular course of business; . . . It is true that the Chemical had no knowledge of the entries made on the Fidelity books nor of the frauds of Harper."

We have already called attention to the fact that the witnesses say that while the *form* by which Harper obtained the transfer of funds was regular, yet the *transaction* was obviously irregular upon his part; and while the clerks could properly obey him, yet by so doing they would not perform their whole duty; they should have gone farther, and have reported to another officer that Harper was thus taking credit without production of right to do so, and should have been particularly careful in examining the next account current from the bank against which Harper made the charge. With this comment upon what our opponents say as to the form of the transaction, we submit

that their concessions result in establishing the following propositions :

(1.) The transfer was the "regular mode" of doing such business. That is, the *form* of the act was correct, though the act itself is charged to be fraudulent.

(2.) The Chemical Bank had no control over the act, and no knowledge of it, nor of its fraudulent character.

(3.) It was "fraudulent," as between Harper and the Fidelity Bank, because it deprived the Fidelity Bank of property—money—which belonged to it.

(4.) The money belonging to the Fidelity Bank, because it had been loaned to that bank by the Chemical Bank.

(5.) Therefore there was an obligation to repay it.

(6.) "Damage" was caused by the fraud and the receiver elected to recover that damage, by the bill exhibited against the directors.

(7.) For all that appears in this record the payment by the directors has entirely indemnified the receiver.

(8.) If he has not been indemnified, and if the Fidelity Bank is still a loser by this transaction, and if we could separate the Fidelity, *as a bank*, from its fraudulent and negligent officers, and call it an *innocent* loser, then it is a case for the application of the rule, *that as between two innocent parties, where one of them must lose, that one shall bear the loss whose conduct has caused it, or has carelessly and negligently enabled its officers or agents to inflict the loss.*

It is stated on page 52 of our opponents' brief that if this loan had not been made by the Chemical Bank, Harper could not have obtained the money which he had credited to himself on the books of the Fidelity Bank. But counsel do not attempt to explain why he could not. There

is nothing in this record to lead one to suppose that Harper could not have done so; on the contrary, there is every reason to suppose that he could have done so. The credit to him was made upon his word only; and it stood upon his word, although when the account came in his word was given the lie. Clearly under any circumstances he could have obtained the credit in his own bank on his word merely, as he did obtain it, and beyond peradventure could have held it until the Chemical Bank's next account current came in. If his power extended thus far, who can say that he could not have covered his tracks in some other way so as to lull the bookkeeper to sleep when the account arrived.

Our opponents follow this assertion with another, that Harper would never have appropriated the money if the Chemical Bank had required a resolution of the board of directors to authorize the loan before making it. Here again we beg leave to say they are not speaking by the card. Either Baldwin, the cashier, was in league with Harper, or he was not. If he was not in league with him, then our opponents' case fails utterly, because of Baldwin's signature to the certificate of deposit, and the notice given to him by the letter sent by the Chemical Bank. If Baldwin was in league with Harper, then it can not be doubted that he would have manufactured copies of as many fictitious resolutions of the board of directors as circumstances required, and have attested them with the corporate seal; for with him as cashier rested the whole power of manufacturing the necessary evidence.

The final contention of our opponents, on pp. 52-53, illustrates the queer results that sometimes follow from driving the mind upon a path it is unwilling to pursue.

They claim to have convinced themselves that it makes no difference upon the merits of the case whether the persons guilty of actual negligence were the officers of the Chemical Bank or Harper's associates in the Fidelity Bank ; and that in either case the Chemical Bank must stand the loss ; they concede that in legal effect Harper's actions in the Fidelity Bank were not different from what they would have been had he reported to its board of directors that he had deposited to the credit of the Fidelity Bank \$300,000 in the Chemical Bank, and wished them to give him the same amount from their own bank ; and they, resting upon his word, had abstracted that amount of money in cash from the vaults of their bank and given it to him. That is to say, they contend that if an agent falsely tells his principal that he has established a credit for the principal with a third person, the principal may pay the supposed credit to the agent and recover it from the third person ! The argument assumes that by some hocus pocus at Cincinnati, of which the Chemical Bank was and remained totally ignorant, the contract which it had made as it thought with the Fidelity Bank could be transferred so as to give that bank the full benefit of it but relieve it from all responsibility.

Surely rhetorical sophistry can not further go.

To conclude, the ultimate question presented by the case at bar is whether a principal, who acts only by agents, and who has been robbed by an agent, can throw his loss for that theft upon an innocent third party, and this, although that third party gave others of his agents information which, when coupled with knowledge they already had, advised them that such a theft had been committed, and although further the principal has, with full knowledge of the facts, compromised with his agents to his

satisfaction for the loss thus caused him. We submit that the correct answer to this question was given by the decree below, and that that decree should be affirmed.

WM. WORTHINGTON,  
GEORGE H. YEAMAN,  
GEORGE C. KOBBE,

*Counsel for Appellee.*



## AUTEN *v.* UNITED STATES NATIONAL BANK OF NEW YORK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

No. 206. Argued March 9, 1899. — Decided April 24, 1899.

In June, 1892, the United States National Bank of New York, by letter, solicited the business of the First National Bank of Little Rock, Arkansas. The latter, through its president, accepted the proposition, and opened business, by enclosing for discount, notes to a large amount. This business continued for some months, the discounted notes being taken up as maturing, until the Arkansas bank suspended payment, and went into the hands of a receiver. At that time the New York bank held notes to a large amount, which it had acquired by discounting them from the Arkansas bank. These notes have been duly protested for non-payment, and the payment of the fees of protest, made by the New York bank, have been charged to the Arkansas bank in account. The receiver refused to pay or allow them. At the time of the failure of the Arkansas bank there was a slight balance due it from the New York bank, which the latter credited to it on account of the sum which was claimed to be due on the notes after the refusal of the receiver to allow them. The New York bank commenced this suit against the receiver, to recover the balance which it claimed was due to it. The receiver denied all liability and asked judgment in his favor for the small balance in the hands of the New York bank. It was also set up that the notes discounted by the New York bank were not for the benefit of the Arkansas bank, but for the benefit of its president, and that the New York bank was charged with notice of this. The judgment of the trial court, which was affirmed by the Circuit Court of Appeals, was for the full amount of the notes, less the set-off. In this court motion was made to dismiss the writ of error on the ground that jurisdiction below depended on diversity of citizenship, and hence was final. *Held*:

- (1) That the receiver, being an officer of the United States, the action against him was one arising under the laws of the United States, and this court had jurisdiction;



## Statement of the Case.

- (2) That it was competent for the directors of the Arkansas bank to empower the president, or cashier, or both to indorse the paper of the bank, and that, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized, and were executed as authorized;
- (3) That the set-off having been allowed by the New York bank in account, the receiver was entitled to no other relief.

Two of the parties to this action in the court below were national banks, one located at New York, the other located at Little Rock, Arkansas. Sterling R. Cockrill, as receiver of the latter bank, was also a party. He resigned and plaintiff in error was appointed. The banks will be denominated respectively the New York bank and the Little Rock bank.

The complaint contained the necessary jurisdictional allegations, and that on December 7, 1892, the City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the State of Missouri, its three promissory notes, each for five thousand dollars, payable four months after date, with interest at the rate of ten per cent per annum from maturity until paid: that said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff: that on December 7, 1892, the McCarthy & Joyce Company, a corporation resident in the city of Little Rock, Pulaski County, Arkansas, and organized and doing business under the laws of Arkansas, executed and delivered to James Joyce, a citizen of the State of Missouri, its two promissory notes, each for five thousand dollars, payable to his order at four and five months respectively after date, with interest from maturity at the rate of ten per cent per annum until paid: that said Joyce afterwards indorsed said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted and delivered said notes to plaintiff: that said notes were each at maturity presented at the First National Bank in Little Rock, Arkansas,

## Statement of the Case.

for payment, and payment being refused, they were each duly protested for non-payment, the fees for which, amounting to twenty-five dollars, were paid by plaintiff. Copies of said notes, with the indorsements thereon, were thereto attached, marked 1 to 5 inclusive, and made part thereof. No part of said notes has been paid, and the same have been presented to the receiver of said bank for allowance, which he has refused to do.

Judgment was prayed for the debt and other relief.

Three of said notes are in the following form :

"\$5000. 34131. LITTLE ROCK, ARK., Dec. 7, 1892.

Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

W. H. SUTTON, *Sec'y.* CITY ELECTRIC ST. R'Y Co.  
H. G. BRADFORD, *P't.*  
No. A, 73485. Due Apr. 7-10, '93."

The following indorsement appears on each: "Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Arkansas; H. G. Allis, *P't.*

Two of the notes were in the following form :

"\$5000. 34128. LITTLE ROCK, ARK., Dec. 7, 1892.

Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

McCARTHY & JOYCE Co.  
GEO. MANDLEBAUM, *Sec'y & Treas.*  
A, 73477. No. 2. Due Ap'l 7-10, '93."

They were indorsed as follows: "James Joyce, H. G. Allis, First National Bank, Little Rock, Ar.; H. G. Allis, *P't.*"

## Statement of the Case.

The receiver only answered, and his answer as finally amended denied that either of the notes described in the plaintiff's complaint was ever indorsed and delivered to the First National Bank; he denied that either of said notes was ever the property of or in the possession of said bank; and denied that the said bank ever indorsed or delivered either of said notes to the plaintiff; he denied that said bank ever received any consideration from said plaintiff for any indorsement or delivery of said notes to it; and averred that the name of the defendant bank was indorsed on said notes by H. G. Allis for his personal benefit without authority from said bank; that the said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money, which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; that if said transaction created an indebtedness against the defendant bank, then the total liability of said defendant bank to the plaintiff by virtue thereof exceeded one tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business which either the plaintiff or the defendant bank was authorized to carry on; that the plaintiff was not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank. Also that at the date of the suspension of the First National Bank the United States National Bank was indebted to it in the sum of \$467.86, that sum then being on deposit in the said United States National Bank to the credit of the First National Bank of Little Rock; and that the same has never been paid.

The receiver prayed that "he be discharged from all liability upon the notes sued on herein, and that he have judg-

## Statement of the Case.

ment against the plaintiff for the said sum of \$467.86, and interest from the 1st day of February, 1893."

The plaintiff bank denied the indebtedness of \$467.86, and averred "that at the time said First National Bank failed it was indebted to plaintiff in a large amount, to wit, the notes sued upon herein, and plaintiff applied said \$467.86 as a credit upon said indebtedness."

The issues thus made up were brought to trial before a jury. Upon the conclusion of the testimony the court, at the request of the plaintiff bank, instructed the jury to find a verdict for it, which the court did, and denied certain instructions requested by the defendant. The jury found for the plaintiff, as instructed, for the full amount of the notes sued, less the amount of the set-off, and judgment was entered in accordance therewith.

A writ of error was sued out to the Circuit Court of Appeals, which affirmed the judgment, and the case was brought here.

There had been two other trials, the rulings in which and the action of the Circuit Court of Appeals, are reported in 27 U. S. App. 605, and 49 U. S. App. 67.

The defendant assigned as error the action of the Circuit Court in instructing the jury to find for the plaintiff bank and in refusing the instructions requested by the defendant. The latter were nineteen in number, and presented every aspect of the defendant's defence and contentions. They are necessarily involved in the consideration of the peremptory instruction of the court, and their explicit statement is therefore not necessary.

The evidence shows that the New York bank solicited the business of the Little Rock bank by a letter written by its second assistant cashier, directed to the cashier of the Little Rock bank, and dated June 21, 1892.

Among other things the letter stated "If you will send on \$50,000 of your good, short-time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent."

The reply from the Little Rock bank came not from its cashier, but from its president, H. G. Allis, who accepted the offer and enclosed notes amounting to \$50,728, among which

## Statement of the Case.

were three of the City Electric Railway Company, the maker of three of the notes in controversy. When first forwarded they were not indorsed, and had to be returned for indorsement. They were indorsed, and the letter returning them was signed by Allis. To the letter forwarding them the New York bank replied as follows:

"NEW YORK, *June 27, 1892.*

H. G. Allis, Esq., President, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in favor of the 24th inst., and proceeds of same placed to your credit."

The notes were enumerated, their amounts calculated and footed up and discount at 4 per cent deducted, and the proceeds, amounting to \$50,216.48, placed to the credit of the Little Rock bank.

On July 6, 1892, the following telegrams were exchanged:

"New York, *July 6, 1892.*

First National Bank, Little Rock, Ark.:

Will give you additional fifty thousand on short-time, well-rated bills discounted at five per cent. Money rates are little firmer. Answer if wanted.

U. S. NAT. BANK."

"LITTLE ROCK, ARK., *July 6, 1892.*

United States Nat. Bank, N.Y.:

We can use fifty thousand dollars additional at five per cent; will send bills to-morrow.

FIRST NAT. BANK."

In accordance with the proposition thus made and accepted, H. G. Allis, as president, wrote on the 9th of July, 1892, to the New York bank a letter, enclosing what he denominated "prime paper, amounting to \$50,301.88," and requested proceeds to be placed "to our credit and advise." These notes were discounted and acknowledged. Their proceeds, less discount, amounted to \$49,641.68.

On July 26, 1892, the New York bank telegraphed:

Statement of the Case.

"NEW YORK, *July 26, 1892.*

First National Bank, Little Rock, Ark.:

Can take fifty thousand more of your well-rated bills discounted at five per cent. U. S. NAT. BANK."

To this H. G. Allis, as president, answered as follows:

"LITTLE ROCK, ARK., *July 29, 1892.*

United States National Bank, New York city.

GENTLEMEN: Your telegram of the 26th, saying you could take \$50,000 more short-time, well-rated paper, I placed before our board to-day.

While it is two weeks earlier than we need it, on account of the rate we will take it now, and I enclose herein paper as listed below; amount, \$50,089.93.

Yours very truly,

H. G. ALLIS, *President.*

We hold collaterals subject to your order; see (pencil) notations on paper for rating. H. G. ALLIS, *Pr."*

In the list of notes were two by the City Electric Street Railway Company and two by the McCarthy & Joyce Co., who were the makers of two of the notes in controversy. There was one by N. Kupferle for \$5000, "due Nov. 8, 1892." The significance of this will be stated hereafter.

These notes were discounted and the fact communicated to H. G. Allis, Esq., president, Little Rock, Ark.

The next letter contains notes for discount from the Little Rock bank, sent by its cashier, W. C. Denney. The proceeds amounted to \$24,413.05, acknowledgment of which was made.

The next communication was about the notes in controversy. It was dated November 25, 1892, and was signed by W. C. Denney, cashier. The letter, however, enclosing the notes was sent by H. G. Allis, as president. The correspondence is as follows:

"The First National Bank of Little Rock, Ark.

Nov. 25, 1892.

United States National Bank, New York city.

GENTLEMEN: Kindly advise us if you can give us \$25,000

## Statement of the Case.

more in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

Yours very truly,

W. C. DENNEY, *Cashier.*"

"NEW YORK, Nov. 28, 1892.

Mr. W. C. Denney, Cashier, Little Rock, Ark.

DEAR SIR: Yours of the 25th is to hand.

We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6 %.

Yours very truly,

H. C. HOPKINS, *Cashier.*"

"LITTLE ROCK, ARK., Dec. 13, 1892.

United States Nat. Bank, New York city.

GENTLEMEN: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying \$175,000 in demand loans on cotton, which we may have to carry two or three months longer.

We enclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

Yours, very truly,

H. G. ALLIS, *President.*

Dickenson Hardware Co., due March 3.....	\$2,500 00
Dickenson Hardware Co., due April 6.....	5,000 00
City Electric St. R'y Co., due April 10.....	5,000 00

<i>Carried forward,</i>	<u>\$12,500 00</u>
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## Statement of the Case.

<i>Brought forward,</i>	\$12,500 00
City Electric St. R'y Co., due April 10 .....	5,000 00
City Electric St. R'y Co., due April 10 .....	5,000 00
McCarthy & Joyce Co., due May 10 .....	5,000 00
McCarthy & Joyce Co., due April 10 .....	5,000 00
	<hr/>
	\$32,500 00

We hold all collaterals recited subjected to your order and for your account."

"NEW YORK, Dec. 16, 1892.

H. G. Allis, Esq., Pres't, Little Rock, Ark.

DEAR SIR: We have this day discounted the following notes contained in your favor of the 13th inst., and proceeds of same placed to your credit:

Dickenson H'ware Co., due M'ch 3, '93.	\$2,500 disc't	\$32 08
Do. do. " Ap'l 6, '93.	5,000 "	92 50
City Electric St. R'y Co. " " 10, .	5,000 "	95 83
" " " 10, .	5,000 "	95 83
Do. do. " 10, .	5,000 "	95 83
McCarthy & Joyce Co. " 10, .	5,000 "	95 83
Do. do. May 10, .	5,000 "	120 83
Amount of notes .....	\$32,500	
Less discount at 6% .....	628 73	
Proceeds .....	<hr/>	\$31,871 27

We enclose herewith note of Dickenson Hardware Co. \$5000 due Ap'l 6th for insertion of amount in body and return to us.

Yours truly,

JNO. J. McAULIFFE,

*Ass't Cashier."*

"NEW YORK, December 17, 1892.

First National Bank, Little Rock, Arkansas:

Letter thirteen received notes discounted proceeds credited account.

UNITED STATES NATIONAL BANK."



## Statement of the Case.

"The First National Bank of Little Rock, Ark.

*Dec. 20, 1892.*

United States National Bank, New York city.

GENTLEMEN: We have your favor of the 16th inst., enclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with \$31,871.27, proceeds of \$32,500.00 of discounts.

Yours very truly, W. C. DENNEY, *Cashier.*"

In the subsequent correspondence Allis takes part but once, and sent the following telegram December 21, 1892:

"LITTLE ROCK, ARK., *Dec. 21, 1892.*

U. S. Nat'l Bank, N.Y.:

Can you discount thirty thousand country banks' paper secured by cotton thirty days no renewal desire to carry over holidays answer day message?

H. G. ALLIS, *President.*"

Henry C. Hopkins, cashier of the New York bank, was called as a witness in its behalf, and after explaining the letters and telegrams which were sent by the banks, and the transactions which they detailed, testified that the dealings between the banks were such as take place between banks carrying on legitimate banking business, in the usual course of business, and that the notes were not discounted in any other way, and that the bank had no notice or intimation that the notes had not been regularly received by the First National Bank or offered by it in the regular course of business or for the benefit of any person other than the bank or interested in the proceeds, and that the United States National Bank in its correspondence and dealings did not recognize H. G. Allis, W. C. Denney or S. S. Smith personally or in any capacity than as representing the First National Bank; and that the transactions were solely with the First National Bank; and that the correspondence and transactions were usual for the president and cashier of a United States

## Statement of the Case.

national bank to carry on; and that the proceeds of the various discounted notes were withdrawn by the Little Rock bank in the regular course of business by its officers.

There was a detailed statement of the transactions between the banks attached to Hopkins' deposition which is not in the record, but instead thereof there appears the following:

"The account current here referred to began June 27, 1892, and continued until the suspension of business of the First National Bank. It shows almost daily entries of debit and credit. It shows that the several notes discounted by the United States National Bank and referred to in the depositions of the officers of that bank, being forty-nine in number, were charged against the account of the First National Bank by the United States National Bank at the several dates of their maturity. In two thirds of the instances where such charges were made the balance to the credit of the First National Bank on the books of the United States National Bank was sufficient to cover the charge. In other instances the balance to the credit of the First National Bank was insufficient to meet the charge at the time of the entry, and in the other instances the account of the First National Bank was in overdraft as shown by the books of the United States National Bank at the time the charge was made.

"The account shows that at the time of the suspension of the First National Bank the latter bank had a credit of \$467.86 upon the books of the United States National Bank. Against this balance the notes in suit with protest fees were charged on the account April 17 and May 15, 1893, making the account show a balance in favor of the United States National Bank of \$24,558.03.

"This is the paper marked '77' referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman and John J. McAuliffe, hereto annexed."

The record also shows that "J. H. Parker, president, Joseph W. Harriman, second assistant cashier, and John J. McAuliffe, assistant cashier, each testified to identically the same facts in the identical language as Henry C. Hopkins, and it is agreed that the depositions of Hopkins shall be treated as the deposi-

## Statement of the Case.

tion of each of the said witnesses without the necessity of copying the deposition of each witness."

There was proof made of the protest of the notes.

There was testimony on the part of the plaintiff showing that it was the custom of the banks at Little Rock to rediscount through their presidents and cashiers until after a decision in the *National Bank case* of Cincinnati in January, 1893; after that it was done by resolution of the board of directors, and the banks of New York and other commercial cities commonly require that now.

By a witness who was cashier of the Little Rock bank from November, 1890, to October, 1891, Allis then being president, it was shown that it was the custom of the bank as to rediscounting notes for the cashier or assistant cashier to refer them to the president, and the president generally directed what amount and where to send them. Whether they were referred to the board of directors, the witness was unable to say.

On cross-examination the witness testified that when the discounts were determined on, the cashier or assistant cashier transacted the business. He, however, only remembered sending off one lot of discounts, Mr. Denney, the assistant cashier, usually carrying on the correspondence. He did not remember that the president ever did anything of that kind. "Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send to."

There were introduced in evidence "the reports or statements by the bank to the Comptroller of the Currency, showing the rediscounts and business of the bank, of date May 17, 1892, and July 12, 1892, as follows: The report of May 17 was sworn to by W. C. Denney, cashier, and attested by James Joyce, E. J. Butler and H. G. Allis, directors, and showed 'notes and bills rediscounted, \$16,132.40.' The report of July 12 was sworn to by H. G. Allis, president, and attested by Charles T. Abeles, E. J. Butler and John W. Goodwin, directors, and showed notes and bills rediscounted, \$81,748.80."

The testimony on the part of the plaintiff in error showed

## Statement of the Case.

(we quote from brief of defendant in error) that "the notes never belonged to the First National Bank; that the three notes of the Electric Street Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the company to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted; that neither of the notes was ever passed upon by the discount board of the bank or appeared on the books of the bank; that after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes (\$25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of \$10,679.44; that Allis was at that time indebted to the Little Rock bank on individual notes for at least \$50,000, and was continuously thereafter indebted to the bank until its failure."

As to the power of the president to direct rediscounts or to indorse the notes of the bank, E. J. Butler, N. Kupferle and C. T. Abeles, who were directors of the bank at the time of the transactions between it and the New York bank, testified respectively as follows:

"(Butler): Was a pretty regular attendant at the board meetings during the year — at nearly all the meetings.

"Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

"A. Never that I knew of. I knew that when Colonel Roots was president he asked and received authority from the board to make rediscounts, but I do not know that Mr. Allis ever asked, and the board, when I was present — he never was given any authority to make rediscounts for the bank.

"Q. Did he have authority from the bank to indorse its papers for rediscount?

"A. No, sir; never that I was aware of."

On cross-examination he testified that he did not recollect of Allis asking for authority; that the question never came before the board as to discounts. He knew that there were dis-

## Statement of the Case.

counts made, but did not recollect any particular ones, but in case there were he would suppose they were on the authority of the board, given in his absence, but did not remember that the question was brought up at all.

"Q. There are a couple of statements made by the bank (being the statements heretofore introduced by the plaintiff) of May 17, 1892, and July 12, 1892, to which you as a director certify, which show, one of May 17 shows rediscounts, \$16,172.40, and the one of July 12, 1892, shows rediscounts, \$81,748.88. Did you sign these?

"A. I couldn't say without referring to the original reports.

"Q. These are the published reports, are they not?

"A. They purport to be the published report, but I do not know anything about it. I was one of the directors at that time.

"Q. That is one of the usual forms of the reports published in the papers, isn't it?

"A. Yes, sir.

"Q. You now tell the jury that you do not know anything about the extent of rediscounts made by it?

"A. No, sir; I cannot remember."

Mr. Denney was cashier in 1892, and he supposed that Denney transacted the business as to indorsements and rediscounting, but did not know and did not recollect that Allis did. Did not hear of him indorsing the notes in suit until after the bank failed.

"(Kupferle): Mr. Allis did not have the power from the board of directors of the bank to indorse its papers for rediscount.

"Cross-examination: There was nothing said in the board about such power. The question was not brought before the board. The bank during that time rediscounted paper. The cashier generally attended to that. I knew that the bank was discounting paper. I recall once where the president requested of the board that the bank should borrow some money. That was in the fall of 1892. I knew that the bank had been discounting paper long before that and borrowing money before

## Statement of the Case.

that, and no authority had been asked of the board to do it. I knew that they were borrowing money and rediscounting paper continually.

"Redirect: We had eleven or thirteen members of the board of directors; I forget which. Never less than eight or nine. There was seldom a meeting when all were present — a majority present.

"Q. Did they at any time rediscount, or authorize the rediscounting of paper? Did they have that authority?

"A. No, sir; that was not their business.

"Q. Theirs was to discount paper for customers of the banks?

"A. The daily offerings, yes, sir."

Did not know of Mr. Allis indorsing the name of the bank upon the paper for the purpose of rediscounting it.

"Q. Did you, as a member of the board of directors, or otherwise, have any information that Mr. Allis was using the name of the bank upon his or other people's paper, for accommodation?

"A. No, sir; I never did.

"Cross-examination:

"Q. You didn't know he was using the name of the bank on the bank's paper?

"A. No, sir.

"Q. You knew he was discounting paper?

"A. No, sir; it was not his place.

"Q. Didn't the correspondence there show he was sending the paper for discount all over the country?

"A. No, sir; I don't know anything about that.

"Q. Wasn't it your business to know it?

"A. I do not know.

"Q. You was vice president and one of the directors?

"A. Yes, sir. I never knew anything about it until the failure of the bank — that he ever used the bank's name."

"(Abeles): Not while I was there (at the meetings of the board) was authority given to Allis as president to indorse or rediscount the notes of the bank. I do not think it was ever mentioned. I knew of the bank rediscounting paper, and

## Opinion of the Court.

somebody was transacting that part of the business. I think I inquired of some of the directors who it was, and was told that the authority vested in the cashier. I do not recollect that I inquired of Allis or Denney."

"[Cohn] was not a director in 1892 — was for ten years prior to that time, and Allis was president in 1891, but did not recollect that he had authority from the board to indorse its paper or to rediscount it.

"Cross-examination: Knew that rediscounting was being done, but supposed it was being done by the cashier — didn't stop to inquire.

"Redirect:

"Q. Who was authorized in the bank to perform that duty?

"A. I understood the cashier.

"Cross-examination:

"Q. How was he authorized?

"A. By law.

"Q. You are simply giving your legal opinion?

"A. Well, I understood that was his authority."

Other facts are stated in the opinion of the court.

Upon filing the record the defendant in error made a motion to dismiss, which was postponed to the consideration of the merits.

*Mr. Sterling R. Cockrill* for plaintiff in error.

*Mr. John Fletcher* for defendant in error. *Mr. W. C. Ratcliffe* was on his brief.

MR. JUSTICE McKENNA, after making the above statement, delivered the opinion of the court.

1. To sustain the motion to dismiss, it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of Appeals is final. But one of the defendants (plaintiff in error), though a citizen of a different State from the plaintiff in the action



## Opinion of the Court.

(defendant in error), is also a receiver of a national bank appointed by the Comptroller of the Currency and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy v. Gibson*, 8 Wall. 498; *In re Chetwood*, 165 U. S. 443; *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401. It is, however, urged that such appointment was not shown. It was not explicitly alleged, but we think that it sufficiently appeared, and the motion to dismiss is denied.

2. Against the correctness of the action of the Circuit Court in instructing a verdict for the New York bank, it is urged that the discounting of the notes in controversy was for the personal benefit of Allis, and that the New York bank was charged with notice of it because of the nature of the transaction, the form of the notes and the order of the indorsements, and also because notice was a question of fact to be decided by the jury on the evidence.

It is also contended that the receiver was entitled to a judgment on the set-off. We will examine each of the propositions.

1. The argument to sustain this is that the facts detailed constitute borrowing money, and that borrowing is out of the usual course of legitimate banking business; and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so. But is borrowing out of the usual course of legitimate banking business?

Banking in much, if not in the greater part of its practice, is in strict sense borrowing, and we may well hesitate to condemn it as illegitimate, or regard it as out of the course of regular business, and hence suspicious and questionable. "A bank," says Morse, (sec. 2, Banks and Banking,) "is an institution usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit to form a joint fund that shall be used by the institution *for its own benefit*, for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign and domestic



## Opinion of the Court.

bills of exchange, coin, bullion, credits and the remission of money; or with both these powers, and with the privileges in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business."

This defines the functions: what relations are created by them? Manifestly those of debtor and creditor—the bank being as often the one as the other.

A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. "The first business of a banker is not to lend money *to* others but to collect money *from* others." (Macleod on Banking, vol. 1, 2d ed. pp. 109, 110.) And Gilbert defines a banker to be "a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another." (Gilbart on Banking, vol. 1, p. 2.)

The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons "to borrow, owe or take up any sum or sums of money on their bills or notes payable at demand." And it had effect until 1772, (about thirty years,) when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created—the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (cheques) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned.

But it may be said these views are elementary and do not

## Opinion of the Court.

help to a solution of the question presented by the record, which is not what relation a bank has or what power its officers may be considered as having in its transactions with the general public, but what is its relation and what power its officers may be considered as having in its transactions with other banks. Indeed, the question may be even narrower—not one of power, but one of evidence. If so, the views expressed are pertinent. They show the basis of credit upon which banks rest, and the necessity of having power to support it; it may be to extend it. Borrowing is borrowing, no matter from whom. Discounting bills and notes may require rediscounting them; buying bills and notes may require selling them again. Money may not be equally distributed. It is a bank's function to correct the inequality. The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis v. Leavitt*, 15 N. Y. 1; *First National Bank v. National Exchange Bank*, 92 U. S. 122; *Cooper v. Curtis*, 30 Maine, 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities.

It is claimed, however, that *Western National Bank v. Armstrong*, 152 U. S. 346, establishes the contrary, and decides the proposition contended for by the plaintiff in error. We do not think it does. Some of its language may seem to do so, but it was used in suggestion of a question which might be raised on the facts of the case, without intending to authoritatively decide it. The facts of that case are different from the facts of the pending one, and in response to its citation we might rest on the difference. But plaintiff in error urges the case so earnestly and confidently that we have considered

## Opinion of the Court.

it better to answer the argument on which it is asserted to be based and remove misapprehension of the extent of the decision.

2. Did the form of the notes or the order of indorsements charge the New York bank with inquiry of Allis' authority or with knowledge of his use of them for his personal benefit?

It may be conceded that an individual negotiating for the purchase of a bill or note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself. These principles are established by *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557; *Central Bank of Brooklyn v. Hammett et al.*, 50 N. Y. 158; *New York Iron Mine v. Negaunee Bank*, 39 Michigan, 644; *Lee v. Smith*, 84 Missouri, 304; *Park Hotel Co. v. Fourth National Bank*, 86 Fed. Rep. 742; *Clafin v. Farmers' & Citizens' Bank*, 25 N. Y. 293.

But it is not meant that circumstances may not explain the notes or may not relieve the taker from the obligation of inquiry. If the order of indorsements and Allis' official position and his relation to the notes were circumstances to be considered, they were not necessarily controlling against all other circumstances, and compelled inquiry as a peremptory requirement of law.

3. In judging of the conduct and rights of the New York bank the question is not what actual authority Allis had, but what appearance of authority he had, or, rather, what appearance of authority he was given or permitted by the directors.

In the inquiry there is involved the two preceding propositions as questions of fact, or of mixed law and fact. The first—the power of a bank to rediscount its paper—as to what the course of dealing of the contending banks was; the second—the form of the notes and their order of indorsements as notice—whether relieved by the circumstances which attended them and the transactions which preceded them.

The evidence shows that it was not only the custom of the defendant bank to rediscount its paper, but that it was

## Opinion of the Court.

the custom of the other banks at Little Rock to do so, and the officers of the New York bank testified as follows:

"Q. Were there any of the dealings between said banks (the parties to this action) other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

"A. No.

"Q. Were the correspondence and transactions carried on by H. G. Allis and W. C. Denney, as you have disclosed, such as are usual for the president and cashier of a United States national bank to carry on and exercise?

"A. Yes."

This testimony certainly has very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks rediscounting paper was in the usual course of their business, and that besides it was the usual course of business in their respective localities. Therefore the discounting of the notes in controversy carried the sanction of such business.

It is contended that the notes gave notice of the want of authority to rediscount them because the indorsement of the bank followed that of Allis, and hence showed that the bank was an accommodation indorser, and because the indorsement of the bank was by its president and not by its cashier.

The order of indorsements did not necessarily import that the Little Rock bank was an accommodation indorser. The order was a natural one if the notes had been discounted in the regular course of business. It is not contended that a want of power precluded the bank from discounting the notes of its officers. It had been done for one of the directors, and his note was rediscounted by the New York bank. It had an example therefore in the dealings of the parties, and, besides, was neither wrong nor unnatural of itself. But it was further relieved from question, and any challenge in the indorsements was satisfied by the circumstances.

It is to be remembered that the discounting the notes in controversy was not the only transaction between the banks. It was one of many transactions of the same kind. They

## Opinion of the Court.

justified confidence, and it was confirmed by the manner in which the notes were presented. It is conceded that the cashier had the power to rediscount the bank's paper, and it was he who solicited the accommodation on account of which the notes were sent to the New York bank. The notes themselves, it is true, were sent by Allis, but expressly on the part of the bank, and subsequent correspondence about them was conducted with the cashier, as we have seen. And there could have been no misunderstanding. The letter of the New York bank which the cashier of the Little Rock bank answered was specific in the designation of the notes, their sum and the proceeds of the discount, and returned one of the notes not in controversy to be corrected. To this the cashier replied:

"Dec. 20, 1892.

United States National Bank, New York city.

GENTLEMEN: We have your favor of the 10th inst., enclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with \$31,871.27 proceeds of \$32,500.00 of discounts.

Yours very truly,

W. C. DENNEY, *Cashier.*"

Notice was therefore brought to him and to the bank of the transaction and almost inevitably of its items. Was he deceived as to the notes which had been sent? It is not shown nor is it suggested how such deception was possible, and a presumption of ignorance cannot be entertained. Therefore, if the discounts he wrote about in his letter of the 20th of December were not in pursuance of those he had requested in his letter of November 25, he ought to have known and ought to have so said. If he had so said, the New York bank could have withdrawn the credit it had given, and Allis' wrong could not have been committed.

The strength of these circumstances cannot be resisted. Against them it would be extreme to say that the New York bank was put to further inquiry. Of whom would it have inquired? Not of Allis, the president of the Little Rock

## Opinion of the Court.

bank, because his authority would have been the subject of inquiry. Then necessarily of the cashier; but from the cashier it had already heard. He began the transaction; he acknowledged its close, accepting the credit which had been created for the bank of which he, according to the argument, was the executive officer. We can discover no negligence on the part of the New York bank. The dealing with the notes in controversy came to it with the sanction of prior dealings with other notes. It was conducted with the same officers. It was no more questionable. The relation of Allis to it, we have seen, was not unnatural, and if the indorsement of other notes was not shown to be by him, it was not shown not to have been by him. The testimony of the officers of the New York bank was that the notes were received and discounted in the regular course of business, and in no way different from the other notes discounted by it for the Little Rock bank, and that they knew the notes were properly indorsed by one of the duly authorized officers of the First National Bank; but as the notes were not in their possession, they were unable to state the name of the officer. The testimony opposed to this, if it may be said to be opposed, is negative and of no value. Some of the directors testified that Allis did not have the power nor did they know of his having indorsed the bank's paper for rediscount. They knew, however, that the bank's paper was rediscounting in large amounts, and that money was borrowing continually, but they scarcely made an inquiry, and one of them testified that only in a single instance did Allis request the board for power to borrow money. The instance is not identified, except to say that it was in the fall of 1892. Of whom, in what amount, whether the request was granted or denied, what inquiry was made, what review of the business of the bank was made, there was absolute silence about. They surrendered the business absolutely to the president and cashier, and intrusted the manner of the execution to them. This court said by Mr. Justice Harlan, in *Martin v. Webb*, 110 U. S. 7, 15: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on

## Opinion of the Court.

around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declaration of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Under section 5136, Revised Statutes, it was competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank, and, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and executed as authorized. *Briggs v. Spaulding*, 141 U. S. 132; *People's Bank v. National Bank*, 101 U. S. 181; *Davenport et al. v. Stone*, 104 Michigan, 521; *First National Bank of Kalamazoo v. Stone*, 106 Michigan, 367; *Houghton v. The First National Bank of Elkhorn*, 26 Wisconsin, 663; *Thomas v. City National Bank of Hastings*, 40 Nebraska, 501.

4. Set-off is the discharge or reduction of one demand by an opposite one. That of plaintiff in error was so applied and the amount due on the notes reduced. He was entitled to no other relief.

*Scott v. Armstrong*, 146 U. S. 499, does not apply. In that case it was held that a debtor of an insolvent national bank could set off against his indebtedness to the bank, which became payable after the bank's suspension, a claim payable to him before the suspension. And it was further held that the set-off was equitable, and therefore not available in a common law action.

But in this case the plaintiff in error pleaded the set-off. His right to do so was derived from the law of Arkansas, and that law provided: "If the amount set off be equal to the plaintiff's demand, the plaintiff shall recover nothing by his action; if it be less than the plaintiff's demand, he shall have

Opinion of the Court.

judgment for the residue only." Gould's Arkansas Digest of Statutes, c. 159, § 5, p. 1020. The law was complied with.

It follows that the Circuit Court did not err in instructing the jury to find for the plaintiff (defendant in error), and judgment is

*Affirmed.*

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